85-1811

CASE NO. _____

Supreme Court, U.S.
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In The Supreme Court of the United States

OCTOBER TERM, 1985

IN RE: JENNY LYNN MINING CORPORATION,
DEBTOR.

STATE OF OHIO
DEPARTMENT OF NATURAL RESOURCES,
Petitioner,

v.

GERALD H. SPIERS, TRUSTEE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether a debtor's statutory obligation to post performance bond intended to ensure reclamation of strip mined land and to defray the State's cost to reclaim is an excise tax entitled to priority treatment pursuant to Section 507 (a)(6)(E)[1] of the Bankruptcy Code.

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[1] Now renumbered as 11 U.S.C. § 507(a)(7)(E) (Supp. II 1985).

PARTIES TO THE PROCEEDINGS BELOW

The Petition to this Court for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is sought by the State of Ohio on the relation of its Attorney General, Anthony J. Celebrezze, Jr. The State of Ohio, Department of Natural Resources, filed a proof of claim in the Chapter 7 dissolution proceedings of Jenny Lynn Mining Company, the debtor, before the United States Bankruptcy Court for the Southern District of Ohio. Gerald H. Spiers is the trustee in bankruptcy for Jenny Lynn Mining Company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATTUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
CONCLUSION	14
CERTIFICATE OF SERVICE	A-69

TABLE OF AUTHORITIES

Page

Cases:

In re William Akers, Jr. Co.,
121 F.2d 846 (3rd Cir. 1941) 10

In the Matter of C. M. & C. Coal Company, Inc.,
33 B.R. 358 (N.D. Ala. 1983) 7

In the Matter of Gifford,
688 F.2d 447 (7th Cir. 1982) 11

In re: Grand Spaulding Dodge, Inc.,
5 B.R. 481 (N.D. Ill. 1980) 7, 12

In re: International Automated Machines, Inc.,
9 B.R. 575 (N.D. Ohio 1981) 10

In re: King,
19 B.R. 939 (S.D. Tenn. 1982) 10

In re: Norton,
Case No. B78-973A (Bktrcy. N.D. Ohio,
decided August 28, 1979) 7, 10

In re: Pan American Paper Mills, Inc.,
618 F.2d 159 (1st Cir. 1980) 7, 10

In re: Payne,
27 B.R. 809 (D. Kansas 1983) 10

Maggio v. Zeitz,
333 U.S. 56 (1948) 6

Midatlantic National Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. ____,
88 L. Ed. 2d. 859, 106 S.Ct. 755 (1986) (Decided
Jan. 27, 1986) 12, 13

National Cable Television Association, Inc. v. United States, 415 U.S. 336 (1974) 8, 9, 12

New Jersey v. Anderson,
203 U.S. 483 (1906) 9

New York v. Feiring,
313 U.S. 282 (1941) 7, 8, 9, 10, 12

Ohio v. Kovacs,
469 U.S. ____, 83 L. Ed. 2d. 649 (1985) 13

Palmer v. Commonwealth of Massachusetts,
308 U.S. 79 (1939) 11

Spiers v. Ohio Dept. of Natural Resources,
780 F.2d 585 (6th Cir. 1986) 1

TABLE OF AUTHORITIES *cont'd*

Page

United States v. River Coal Company,
748 F.2d 1003 (6th Cir. 1984) 8
United States v. Sotelo,
436 U.S. 268 (1968) 7, 9

Statutes:
Federal:
United States Constitution, Article 1, § 8 6
United States Bankruptcy Code,
11 U.S.C. § 362 (1979) 3
11 U.S.C. § 362(a)(b)(5) (1979) 3, 11
11 U.S.C. § 507 (1979) 4
11 U.S.C. § 507(a)(6)(E) (1979) 7, 12, 13
[Renumbered 11 U.S.C. § 507(a)(7)(E)
(Supp. II 1985)]
11 U.S.C. § 554 (1979) 11
11 U.S.C. § 545 (1979) 13
Surface Mining Control and Reclamation Act
of 1977, 30 U.S.C. § 1201 *et seq.* 2
Fed. Bankruptcy Rule 3002(c) 3

State:
Ohio Revised Code,
§ 1513.07(A) (Page's 1978) 2
§ 1513.08 (Page's 1978) 2
§ 1513.18 (Page's Supp. 1984) 2

Miscellaneous:
2 *Colliers on Bankruptcy,* § 101.00
(15th Ed. 1985) 6
H.R. Rep. No. 95-595, 95th Cong., 1st Sess.
(1978), 5 U.S. Code Cong. & Ad. News 5963 11
S. Rep. No. 95-989, 95th Cong., 2nd Sess.
(1978), 5 U.S. Code Cong. & Ad. News 5787 11

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, from which this appeal is taken, is reported at 780 F.2d 585 (6th Cir., 1986). The opinions of the United States Bankruptcy Court and District Court, entered on February 2, 1983 and November 14, 1984, respectively, were unreported. The decisions of the lower courts are reproduced in the Appendix.

JURISDICTION

The instant case began in the United States Bankruptcy Court, Southern District of Ohio, when the trustee in bankruptcy objected to the proof of claim filed by the State of Ohio. The District Court affirmed the decision of the Bankruptcy Court giving the State's claim priority status. On January 10, 1986, the Sixth Circuit Court of Appeals entered its judgment reversing the two lower courts. This petition for writ of certiorari was filed within 90 days of that date. Jurisdiction over the case is conferred upon the Court pursuant to 28 U.S.C. Section 1254 (1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves an interpretation of the priority provisions of the Bankruptcy Reform Act of 1978, 11 U.S.C. § 507 and the determination of what is considered a tax for the purposes of that section. The relevant provisions of the Bankruptcy Act of 1978 are set forth in the Appendix to this petition.

STATEMENT OF THE CASE

The Surface Mining and Reclamation Act of Ohio, codified in Chapter 1513 of the Ohio Revised Code, requires all lands affected by surface mining activities to be reclaimed to the standards described therein. So important is the reclamation of the disturbed land, that the State of Ohio is obliged to perform the work when an operator fails to meet his statutory duty. Ohio Rev. Code Section 1513.18 (Supp. 1984). Ohio's reclamation statute was enacted pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Section 1201 *et seq.*, and gave the state primary jurisdiction over surface mining operations and reclamation. To ensure that reclamation is performed by a mine operator, and, in the event of a default of such performance, that the cost of reclamation is still borne by the mine operator, both the federal and state laws require an operator to post a performance bond guaranteeing reclamation in the form of cash, certificates of deposit or surety bond, before any area is affected by mining operations. 30 U.S.C. Section 1259 (1977); Ohio Rev. Code Section 1513.07 (A). If an operator fails to reclaim the land, the state with primacy forfeits the bond and uses the proceeds of the bond to perform the reclamation itself. Ohio Rev. Code Section 1513.18 (Pages Supp. 1984). In addition to the reclamation performance bond requirement, Chapter 1513 requires an operator to pay a permit fee to cover some of the operating costs of the division of reclamation. The reclamation performance bond, in purpose and by definition, however, is separate and distinct from the permit fee also required by the Chapter. Ohio Revised Code Section 1513.08.

Under the statutory scheme of Chapter 1513, when a permit to conduct surface mining operations is issued, reclamation performance bond is posted for that portion of the land proposed to be affected by the operator during the first year of operations. As mining progresses and additional land located in the permit area for which no bond has been posted is to be affected, the operator must file additional reclamation performance bond with the state. Section 1513.08 Ohio Rev. Code. The amount of additional bond to be posted is based upon the annual report required to be filed by the operator.

Pursuant to Chapter 1513 of the Ohio Revised Code, Jenny Lynn Mining Company applied for and was granted a permit to surface mine in the State of Ohio by the Department of Natural Resources. Subsequent to its initial deposit of cash and certificates of deposit as reclamation performance bond, however, Jenny Lynn Mining failed to submit the additional performance bond required by the statute for succeeding increments of land it affected by its operations. Jenny Lynn also failed to reclaim the unbonded acreage and forced the State of Ohio to reclaim the affected area at its own cost. On November 30, 1980, the State filed suit in the Common Pleas Court of Vinton County, Ohio, Case No. 80 CVII-7C, to recover the delinquent reclamation bond owed by Jenny Lynn Mining. On February 18, 1981, Jenny Lynn Mining filed its petition in bankruptcy and stayed the State court proceeding pursuant to 11 U.S.C. Section 362.

The State of Ohio filed its proof of claim, docketed as proof of claim number 15, in the bankruptcy proceeding on August 7, 1981. The claim was based upon the company's "nonpayment of cash and non-depositing of surety bonds or certificates of deposit required" and was filed as a priority claim. On October 7, 1982, the trustee objected to the State's claim on the grounds that "no documentation was attached to the proof of claim substantiating the claim".[1]

Upon consideration of the briefs and oral argument of the parties, Judge Thomas M. Herbert of the bankruptcy court held that the State's proof of claim was valid, presented a claim for an excise tax and was entitled to priority treatment in the bankruptcy proceeding. The trustee appealed the bankruptcy court's decision to the United States District Court for the Southern District of Ohio. On November 14, 1985, Judge

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[1] The trustee contended that the State's claim was based upon a writing and since no documentation was attached, the proof of claim was defective under Rule 3002 (c) of the Bankruptcy Rules. The Bankruptcy Court, District Court and the Circuit Court of Appeals found this objection without merit holding that the State's claim was based upon a statutory obligation, not on a writing, and that attaching a copy of the statute would have added nothing to the claim.

Robert M. Duncan filed his Opinion and Order affirming the bankruptcy court and finding the State's claim to be an excise tax for the purposes of 11 U.S.C. Section 507.

On December 14, 1984, the trustee appealed the Opinion and Order of the district court to the Sixth Circuit Court of Appeals. On January 10, 1986, that court reversed the judgments of the lower courts with respect to the priority status of the State's claim on the grounds that the reclamation performance bond required by Chapter 1513 is not an exaction for a public purpose and therefore not an excise tax entitled to priority in a bankruptcy proceeding. The Sixth Circuit Court of Appeals held that the statutorily required reclamation performance bond, intended to ensure the performance of reclamation and to defray the State's costs of reclamation in cases of an operator's default, is a fee which bestows an individual benefit on a surface mine operator not shared by the other members of society.

Ohio's petition is from the Sixth Circuit's holding that the reclamation performance bond ensuring reclamation of stripped land does not bestow a benefit shared by all members of society and is, therefore, not a tax for bankruptcy purposes.

REASONS FOR GRANTING THE PETITION

The instant case presents a question of major importance to federal, state and local governments that attempt to protect public health and safety and the environment through regulatory laws. The use of taxes in various forms to fund and enforce the health, safety and environmental regulations adopted pursuant to a government's police powers is a widespread and accepted use of the taxing power. Indeed, such use of the taxing power is one of the most powerful mechanisms available to a government in its attempts to protect the health and safety of the public and the environment.

Congress, by granting taxes priority in bankruptcy proceedings, and this Court, by applying a broad definition to the term "tax" for bankruptcy purposes, have recognized the legitimacy and the importance of such payments and the programs they support when compared to the competing interests of the debtor and his unsecured creditors.

The decisions of the bankruptcy court and the district court below confirm the Congressional intent to place the taxes assessed for the protection of the public and the environment above the interests of the debtor and his unsecured creditors. Those courts held that a reclamation performance bond posted to ensure reclamation of stripped land and to impose the cost of reclamation on the mine operator was a tax benefitting and protecting the public and the environment. The Sixth Circuit, however, departing from this Court's well accepted definition of the word "tax" for bankruptcy purposes, held that the obligation to post a reclamation porformance bond was not an obligation arising from the use of the taxing authority and did not benefit the public.

Not only does the Sixth Circuit's decision contravene the Congressional intent that exactions, no matter what their name, made to support a governmental undertaking be granted a priority in bankruptcy proceedings, it conflicts with the applicable decisions of this Court defining "tax" for bankruptcy purposes. Moreover, the lower court's decision will allow a debtor to escape his statutory obligations and impose them upon the very entity meant to be protected and held harmless by the exaction, the public.

The Sixth Circuit's decision in *Jenny Lynn* will force the people of Ohio to bear the entire cost of reclaiming the land mined by the debtor company; a cost from which the State tried to protect them by exercising its taxing power in conjunction with its police power to require the company to post a reclamation performance bond, a cost which the state considered and Congress intended to have priority status in case of a bankruptcy. The Sixth Circuit's decision will advance the pecuniary interest of Jenny Lynn Mining, a company which violated the law, and its unsecured creditors who chose

to lend to the company without security, at the expense of the public. Most importantly, the decision of the Sixth Circuit emasculates the regulatory scheme enacted by Ohio and other coal-bearing states to conserve natural resources and to ensure that stripped land be reclaimed. Similarly, the decision puts at risk numerous other police power enactments, such as worker's compensation programs, which use the taxing power for implementation. Accordingly, Ohio seeks to have this Court reverse the decision below and restore tax claims, whatever their name, to the priority to which Congress and this Court have determined they are entitled, thereby protecting the regulatory schemes used to protect the public health and safety and the environment.

A. The Sixth Circuit Court Of Appeals Decided A Federal Question, The Definition Of "Tax" For Bankruptcy Purposes, In Conflict With The Applicable Decisions Of This Court Thereby Requiring The Court To Exercise Its Supervisory Power Over The Bankruptcy System.

Bankruptcy is a discrete body of law intended to be nationwide in application. Article 1, Section 8 of the United States Constitution provides that Congress shall have the power to establish "uniform laws on the subject of bankruptcies throughout the United States." There has been a uniform bankruptcy law since 1898 and oversight of the operation of the bankruptcy system has been held proper grounds to invoke the Court's supervisory authority in bankruptcy cases. *Maggio v. Zeitz,* 333 U.S. 56 (1948).

Because of the Constitutional mandate for uniformity, certain terms of art have evolved and been adopted by the Court in its interpretation of bankruptcy law to eliminate nuances of meaning which may exist for a single word in different areas of law and over state lines. Eg., 2 *Colliers on Bankruptcy* Section 101.00. The terms "tax" and "excise tax" are examples. Their definition is important because a claim classified as a tax is accorded priority treatment in the

distribution of assets in the bankruptcy proceedings. 11 U.S.C. 507 (a)(6)(E). Although the bankruptcy code does not define "excise tax", this Court construed the term in *New York v. Feiring,* 313 U.S. 282 (1941). According to that decision, taxes, for bankruptcy purposes, are "those pecuniary burdens laid upon individuals or their property, regardless of their consent, for the purpose of defraying the expenses of government or of undertakings authorized by it." 313 U.S. 283 at 285. Further, this Court stated that whether an obligation is a tax entitled to priority treatment in bankruptcy proceedings is a question of federal law and that the characterization or name given to a state obligation should not affect its priority status if it fits the definition of a tax. See also, *United States v. Sotelo,* 436 U.S. 268, 275 (1968).

The broad definition adopted by the Court allowed claims, which in other areas of the law would not be considered taxes, to enjoy that status for the limited purpose of bankruptcy. Thus in *In re: Pan American Paper Mills, Inc.,* 618 F.2d 159, 162 (1st Cir. 1980), the court held that premiums paid pursuant to a State's workers' compensation statute were taxes for the limited purposes of bankruptcy. In *In re: Norton,* Case No. B78-973 (A) (Bktrcy. N.D. Ohio, 1979) (unreported) (in appendix), the court held that fees received from the sale of hunting and fishing licenses were taxes for bankruptcy purposes, and in *In the Matter of C.M. & C. Coal Company, Inc.,* 33 B.R. 358 (Bkrtcy. N.D. Alabama, 1983) the court held reclamation fees to be taxes for the purposes of bankruptcy.

As can be seen from these cases, the *Feiring* definition of "tax" for bankruptcy purposes has allowed the states to include financial responsibility elements in their comprehensive regulatory programs to protect the public health and safety and the environment which would otherwise be completely frustrated by bankruptcy proceedings. See also, *In re: Grand Spaulding Dodge, Inc.,* 5 B.R. 481 (D.C. Ill, 1980). The Sixth Circuit Court of Appeals, however, departed from the Court's decision in *Feiring* and, using non-bankruptcy cases, created its own analysis of the word "tax". The Sixth Circuit Court of Appeals decided a federal question in conflict with

the applicable decisions of this Court defining "tax" for bankruptcy purposes in contravention of the constitutional mandate for uniformity.

The Sixth Circuit looked to whether the claim was an exaction for public purposes or a voluntary payment for a private benefit to determine if the state's claim for performance bond was a tax for bankruptcy purposes. Relying on *National Cable Television Association, Inc. v. United States,* 415 U.S. 336 (1974), the Court reasoned that a claim based upon an exaction for public purposes is a tax; a claim based upon a governmentally imposed charge granting a benefit to an individual requesting permission to engage in a regulated activity is a fee. 780 F.2d 585 at 588. Applying the facts to its analysis the court found the Chapter 1513 reclamation performance bond to be a license fee which bestowed a benefit, the privilege of surface mining, upon Jenny Lynn Mining which was not shared by the other members of society.

Taking this finding to its logical conclusion, the Sixth Circuit held that the public is not benefitted by the reclamation of strip mined land or the defraying of the State's cost to reclaim stripped land, an absurd result. Indeed, in *U.S. v. River Coal Company,* 748 F.2d 1003 (6th Cir. 1984), a case previously decided by the Sixth Circuit and heavily relied upon by the court in *Jenny Lynn,* the court held that the reclamation of strip mined land was public benefit.

The court's reliance on *National Cable* is misplaced and in conflict with the applicable decisions of this Court. First, unlike *Feiring, National Cable* does not speak to the definition of tax for the limited purposes of bankruptcy. In *National Cable,* the Supreme Court addressed the narrow issues of whether the fee imposed by the Federal Communications Commission on cable television operators pursuant to the Independent Offices Appropriation Act was a proper delegation of the taxing authority. It did not involve the construction of the term "excise tax" for bankruptcy purposes. The Court's discussion of the characteristics of taxes and fees in *National Cable* was made in the context of separation of powers

argument in a non-bankruptcy setting. Accordingly, *National Cable* is not applicable to the issue of how a tax is defined for bankruptcy purposes. Just as the Supreme Court limited the holding of *Feiring* to bankruptcy cases, the *National Cable* definition of taxes and fees is limited in scope to taxing authority cases and cannot be introduced into a bankruptcy case.

Second, as early as 1906, this Court held that the form of an exaction does not affect its substance as a tax. In *New Jersey v. Anderson,* 203 U.S. 483 (1906), this Court held that an annual license fee on a corporation for the privilege of continuing to exercise its corporate franchise met the requirements of a tax for bankruptcy purposes, stating:

> It is not necessary to enter upon a discussion of the different forms a tax may take. Generally speaking, a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting government.

203 U.S. 483 at 492.

More recently, in *United States v. Sotelo,* 436 U.S. 268 (1978), this Court held that a penalty assessed pursuant to Section 6672 of the Internal Revenue Code was a tax for bankruptcy purposes and stated that the name given to claims "does not alter their essential character as taxes for the purposes of the Bankruptcy Act." The lower court's analysis in this case which centered upon distinguishing a tax from a fee to determine whether a claim is a tax for bankruptcy purposes, ignored the well established substance over form holdings of this Court in the *Anderson* and *Sotelo.*

By relying on *National Cable* to analyze the issue presented for review rather than following *New York v. Feiring,* a case directly on point previously decided by this Court, the Sixth Circuit Court of Appeals departed from the uniform definition of tax for bankruptcy purposes and decided a federal question in conflict with the applicable decision of this

Court. Accordingly, a writ of certiorari should be granted so that this Court may exercise its supervisory powers and restore the constitutionally mandated uniformity to bankruptcy law.

B. The Decision Below Creates A Conflict Among The Circuits With Respect To The Definition Of The Word "Tax" For Bankruptcy Purposes.

Other Circuit Courts of Appeal have adopted the definition of tax for bankruptcy purposes set out in *New York v. Feiring, supra.* For example, the First Circuit, in *In re: Pan American Paper Mills, Inc.*, 618 F.2d 159 (1st Cir. 1980) applied the *Feiring* definition to a claim for premiums due under a State's worker's compensation act and held that such premiums were taxes for the purposes of bankruptcy. Similarly, the Third Circuit held that unemployment compensation payments were taxes and entitled to priority treatment in bankruptcy proceedings. *In re: William Akers, Jr. Co.*, 121 F.2d 846 (3rd Cir. 1941).[2]

The Sixth Circuit's departure from the *Feiring* analysis has created a conflict among the Circuits which this Court, by granting a writ of certiorari should address.

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[2] Similarly, the Sixth Circuit's reasoning conflicts with numerous cases decided by the bankruptcy and district courts within and outside of the circuit. See, *In re: Payne*, 27 B.R. 809 (Bkrtcy. Kansas, 1983); *In re: King*, 19 B.R. 939 (Bkrtcy. E.D. Tenn., 1982); *In re: C.M. & C. Coal Company, International Automated Machines, Inc.*, 9 B.R. 575 (Bkrtcy. N.D. Ohio, 1981), *In re: Norton*, Case No. 73A (Bkrtcy. N.D. Ohio, 1979) (unreported - in appendix). Thus, prior to the decision below, the constitutional goal of a nationally uniform bankruptcy system was established. The Sixth Circuit's decision, however, splinters the previous uniformity within which existed within the bankruptcy system.

C. The Decision Below Represents A Failure Of The Sixth Circuit Court Of Appeals To Honor A Policy Choice Made By Congress Which This Court, In View Of Its Supervisory Power, Must Review.

Throughout the development of federal bankruptcy law, tension between the competing interests of a fair administration of a debtor's estate and the enforcement of a state's police power has existed. Debtors have attempted to shelter themselves in the bankruptcy courts to escape responsibilities created by the regulatory programs enacted under a state's police powers. As early as 1939, however, this Court admonished that a bankruptcy proceeding cannot be used to excuse noncompliance with state regulatory programs or to displace the policy judgments of a state's administrative agencies, *Palmer v. Commonwealth of Massachusetts*, 308 U.S. 79 (1939).

Although the stated purpose of bankruptcy law is to equitably distribute the assets of a debtor among his creditors and allow him to make a fresh start, *In the Matter of Gifford*, 688 F.2d 447 (7th Cir. 1982), bankruptcy law also recognizes the importance of the protection of the states' exercise of its police power to protect the public health and safety and the environment. In fact, a concern repeated by both houses of Congress throughout the legislative history of the Bankruptcy Reform Act of 1978 is the importance of allowing states to enforce their regulatory laws despite the traditional protection afforded by bankruptcy to the debtor and his creditors. See, House Report No. 95-595, 95th Cong., 1st See. (1978) at 155-156; Senate Report No. 95-989, 95th Cong. 2nd Sess. (1978) at 52.

The implementation of this Congressional concern is found throughout the bankruptcy statute. For example, 11 U.S.C. Section 362 (a)(b)(5) grants to the state an exemption from the automatic stay enjoyed by the debtor to enforce their states' police or regulatory powers. Similarly, a bankruptcy trustee's abandonment power pursuant to 11 U.S.C. Section 554 may be limited when the states' public health and safety

laws would be jeopardized by the abandonment. In *Mid-atlantic National Bank v. New Jersey Department of Environment Protection,* 474 U.S. ____, 88 L. Ed. 2d. 859 (1986), this Court stated that "Congress has expressly provided that the efforts of the Trustee to marshall and distribute the assets of the estate must yield to governmental interest in public health and safety. Thus, the powers of a bankruptcy court do not include the power to interfere with the comprehensive regulatory laws of a state. *In re: Grand Spaulding Dodge, Inc.,* 5 BR 481, (D.C. Ill, 1980).

The regulatory schemes enacted by a state to protect the public health and safety may take many forms, including prohibitions, operating stipulations, reporting requirements or taxes. That taxing is an accepted method of implementing a regulatory scheme to protect the public health and safety and the environment is well established. *National Cable, supra.*

To prevent the deterioration of regulatory schemes using the taxing power for support by debtors in bankruptcy proceedings, Congress enacted 11 U.S.C. 507 (a)(6)(E) giving taxes a priority status in bankruptcy. In furtherance of that end, this Court gave the word tax, as used in that section, a broad definition to afford the states the opportunity to protect a wide range of regulatory schemes. *New York v. Feiring, supra.*[3] Together, 11 U.S.C. Section 507 (a)(6)(E) and the *Feiring* definition of tax establish a mechanism within the bankruptcy system which enables the states to protect exactions made to support and implement their police and regulatory powers.[4]

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[3] Although the *Feiring* definition of tax for bankruptcy purposes has been on record for more than 40 years, Congress has not deemed it necessary to alter that definition despite major legislative changes that have occurred in bankruptcy law during that time.

[4] A number of states have taken advantage of this mechanism and classified exactions for workers compensation, wildlife conservation and abandoned mine land reclamation programs as taxes for bankruptcy purposes and received priority in distribution. See, *In re: Pan American Paper Mills, supra; In re: Norton, supra; In re: King, supra.*

In her concurring opinion in *Ohio v. Kovacs*, 83 L. Ed. 2d. 649 (1985), Justice O'Connor advocates that states work within the bankruptcy system to enforce their environmental laws against a debtor. Since a states' claim to the assets of a bankruptcy estate relative to the other creditors depends upon its classification, the states should protect their interest in the enforcement of its police power exactions by properly classifying their claims within the bankruptcy proceedings. As an example, Justice O'Connor suggests that the states elevate post-judgment claims for environmental clean-up costs to the status of statutory liens which may be avoided only in specific circumstances.[5] 11 U.S.C. Section 545.

In the instant case, the State of Ohio worked within the bankruptcy system to maintain the integrity of its surface mining reclamation program by filing its claim against Jenny Lynn Mining Corporation as a priority tax claim pursuant to 11 U.S.C. 507 (a)(6)(E). The bankruptcy court and the district court upheld the priority of the reclamation performance bond and they conformed to the Congressional intent that state programs to protect the public health and safety and the environment not be thwarted by debtors seeking to avoid their statutory responsibilities by entering bankruptcy. The Sixth Circuit Court of Appeals, however, did not recognize this Congressional intent and held that Ohio's claim for statutorily required performance bond guaranteeing that the mine operator would bear the cost to reclaim the land affected by his strip mining operations was not a tax, but rather a general unsecured claim without priority.

The Sixth Circuit's opinion effectively placed the administration of the debtor's estate above the states' interest in enforcing their police power, a result not intended by Congress. The decision below represents a failure of the lower court to honor a policy choice made by Congress which this Court, in view of its supervisory power, should review. Accordingly, the State of Ohio requests that this Court grant their petition for writ of certiorari.

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[5] *See also*, the dissenting opinion joined by Justices Rehnquist, Burger, White and O'Connor in *MidAtlantic National Bank v. New Jersey*, 474 U.S. ____, 88 L. Ed. 2d. at 875.

CONCLUSION

The case at bar presents an issue of vital concern to state governments across the country involving the conflict between the states' interest in protecting public health and safety and the proper administration of a bankruptcy estate. Not only does the Sixth Circuit's opinion below conflict with the applicable decisions of this Court on a federal question, it creates a conflict between the First and Third Circuits and itself concerning the proper definition and application of the word "tax" for bankruptcy purposes. Moreover, the lower courts refusal to honor Congress' choice to grant the states a priority in bankruptcy for exactions made to further their undertakings to protect the public health and safety calls for the exercise of this Court's supervisory authority. Therefore, the State of Ohio respectfully requests that this Court grant a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: JENNY LYNN MINING CO.,
Debtor;

GERALD H. SPIERS, Trustee,
Plaintiff-Appellant,

v.

OHIO DEPARTMENT OF NATURAL RESOURCES,
Defendant-Appellee.

ON APPEAL from the United States
District Court for the Southern
District of Ohio.

Decided and Filed January 10, 1986

Before: LIVELY, Chief Judge; CONTIE, Circuit Judge; and BROWN, Senior Circuit Judge.

LIVELY, Chief Judge. The principal question in this case is whether Ohio's strip mining permit fee requirement for posting a performance bond is an excise tax entitled to priority treatment under the Bankruptcy Code, 11 U.S.C. §§ 101 et seq. (1982). The matter is here on appeal from the district court, which affirmed the finding and conclusion of the bankruptcy court that the permit fee is an excise tax.

I.

Jenny Lynn Mining Co. (Jenny Lynn) was licensed by the Ohio Department of Natural Resources (ODNR) to carry on strip mining operations. On February 18, 1981 Jenny Lynn filed a voluntary petition in bankruptcy in the Southern District of Ohio. The petition sought "straight" bankruptcy, that is, liquidation under Chapter 7. Following the election of Gerald H. Spiers as trustee, ODNR filed several proofs of claim. We are concerned only with proof of claim #15, filed August 5, 1981, in which ODNR sought priority status for a claim of $42,060. On the proof of claim form ODNR described the ground of liability as:

> Non-payment of cash and non depositing of surety bond or certificates of deposit required.

The trustee filed an objection to proof of claim #15 on the ground that "[n]o documentation was attached to the proof of claim substantiating the claim." The basis of the objection was former Bankruptcy Rule 302(c),[1] which provided:

> When a claim, or an interest in property of the debtor securing the claim, is founded on a writing, the original or a duplicate shall be filed with the proof of claim unless the writing has been lost or destroyed. If lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim. If a security interest is claimed, the proof of claim shall be accompanied by satisfactory evidence that the security interest has been perfected.

The bankruptcy court conducted a hearing on the trustee's objection and concluded that Rule 302(c) did not apply since ODNR's claim was based on an obligation created by a statute and was not founded on a writing. The bankruptcy judge wrote:

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[1]Proceedings in this case were subject to the Bankruptcy Rules which were superseded August 1, 1983. New Rule 3001(c) retains the "writing" requirement.

> Where a Proof of Claim is based upon the failure to perform a state statutory act, it will not generally be found necessary to attach documentation of the enactment.

The parties agreed that the claim was entitled to priority if the permit fee was in fact an excise tax. The permit fee requirement was contained in Ohio Revised Code (O.R.C.) § 1513.07(A) (1978), which provided[2] in part:

> No licensed operator shall conduct a strip mining operation without a permit for such operation issued by the chief of the division of reclamation. The chief shall issue an order granting a permit upon the approval by him of an application, as required by this section, payment of a permit fee in an amount equal to the product of thirty dollars multiplied by the number of acres, estimated in the application, which will comprise the area of land affected within the permit period by the strip mining operation for which the permit is requested, and the deposit of a surety bond, cash, or certificates of deposit as prescribed by division (A) of section 1513.08 of the Revised Code for the number of acres that the operator states in his application that will be affected during the first year of operation under the permit.

Examining the entire reclamation law the bankruptcy judge noted that the bond or money required to be deposited in order to obtain a permit was used both for actual reclamation of land that a strip mine operator failed to reclaim, and for expenses of operating the division of reclamation. He wrote, "[T]he privilege of operating a strip-mine in Ohio carried with it a statutorily imposed charge, or expense of doing business, to support both reclamation and operation of the agency established by the state to implement reclamation."

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[2]Section 1513.07 was redrafted in 1981, but the permit fee requirement was retained.

Defining an excise tax as "a tax imposed upon the performance of an act, the engaging in an occupation, or the enjoyment of a privilege," the bankruptcy court concluded that the permit fee is an excise tax. The court found the measure of the tax to be tied to "the meeting of responsibilities which exist concomitantly with the enjoyment of the privilege of operating a strip-mine."

On appeal to the district court the trustee argued that ODNR's claim did not involve an excise tax. According to the trustee, it was either a claim for a penalty or for a license fee, or a claim arising from the debtor's failure to perform its duties. However, the district court agreed with the bankruptcy court on both issues. The district court determined that the claim was clearly based on a statutory obligation, not on a writing between Jenny Lynn and ODNR. The district court also held that the findings on which the bankruptcy court based its characterization of the permit fee as an excise tax were not clearly erroneous, and upheld the determination that the claim was one for a tax, and therefore entitled to priority.

II.

A.

We agree with the courts below that Rule 302(c) did not apply to ODNR's claim. With respect to unsecured claims, the purpose of Rule 302(c) was to apprise the bankruptcy court and the trustee of the terms of any writing which formed the basis of a claim. The statutory requirement that strip mine operators post performance bonds to obtain permits is clear and unconditional. There was no documentation that would have provided additional notice to the trustee of the basis for the claim. Attaching a copy of the statute would have added nothing to the proof of claim. Proof of claim #15 was not based on a "writing."

B.

Government claims for excise taxes are entitled to priority under 11 U.S.C. § 507(a)(6)(E) (1978).[3]

> (a) The following expenses and claims have priority in the following order:
>
> * * *
>
> (6) Sixth, allowed unsecured claims of governmental units, to the extent that such claims are for—
>
> * * *
>
> (E) an excise tax on—
>
> (i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or
>
> (ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

The bond or deposit required by O.R.C. § 1513.07(A) was "for the payment of an amount of money equal to the estimated cost to the state to perform reclamation . . . in case of default by the operator." O.R.C. § 1513.08(A) (1975). In addition to requiring an operator to pay a fee and deposit a surety bond, cash or certificate of deposit when applying for a strip mining permit, the reclamation statute required additional bonds to cover "increments" as the mining extended to portions of the permit area not covered by the first year of operation. O.R.C. § 1513.08(A) (1981).

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[3]Now renumbered as 11 U.S.C. § 507(a)(7)(E) (Aupp. II 1982).

The trustee contends that ODNR's claim is not founded on an excise tax, but is merely a general claim for an unsecured debt. This court recently dealt with a somewhat similar question in *United States v. River Coal Co., Inc.*, 748 F.2d 1103 (6th Cir. 1984). The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 et seq. (1982), requires strip mine operators to remit for deposit in the Abandoned Mine Reclamation Fund a reclamation fee of 35 cents per ton of coal mined. 30 U.S.C. § 1232(a). A preliminary question in *River Coal* was whether these "fees" are in fact "taxes" and nondischargeable in bankruptcy. The district court held that the fees are taxes and the debtor in Chapter 11 proceedings argued on appeal that they are true fees. This court concluded that the reclamation fees are taxes and recited several characteristics which distinguish governmentally imposed fees from taxes. We quoted from the opinion of the Supreme Court in *National Cable Television Assn., Inc. v. United States*, 415 U.S. 336, 340-41 (1974):

> A fee . . . is incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a houlse or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society.

This court determined that "the chief distinction is that a tax is an exaction for public purposes while a fee relates to an individual privilege or benefit to the payer." 748 F.2d at 1106. The federal statute under consideration in *River Coal* requires a permit fee as well as reclamation fees, and this court noted the difference between the two charges:

> The permit is issued at the request of an operator and bestows an individual benefit — the privilege of operating a surface mine — on the applicant. It is similar to a license to practice a profession or to conduct a broadcast station. The abandoned mine reclamation fee is quite different.

> It is imposed as an additional charge on operators who have already received permits. Unlike the permit fee, the reclamation fee does not confer a benefit on the operator different from that enjoyed by the general public when environmental conditions are improved. On the contrary, it is an involuntary exaction for a public purpose — to create a fund to be used for "reclamation and restoration of land and water resources adversely affected by past coal mining." 30 U.S.C. § 1231 (c)(1). The reclamation fee has the essential characteristics of a tax, and we conclude it is a "tax" for the purposes of § 17 of the Act.

Id.

The permit requirements of the applicable Ohio reclamation law in the present case paralleled those of the federal law considered in *River Coal.* The requirements of performance bonds were almost identical: Both required the amount of the bond to depend on the reclamation requirements of the approved permit, and both required additional bonds for further "increments." Compare O.R.C. § 1513.08(A)(1981) with 30 U.S.C. § 1259(1982). In neither case do the permit fees have the characteristics of the reclamation fees, which were a separate requirement. The distinction made between the two exactions in *River Coal* applies here.

We conclude that the claim filed by ODNR, for a bond or cash required to be deposited in order to obtain a permit, was not based on an excise tax. The deposit was required because the operator had requested a permit, and the permit bestowed a discrete benefit on the applicant — the privilege of operating a surface mine. Without the deposit the reclamation division would not have issued a permit. This charge is unlike the "reclamation fee" considered in *River Coal.* Payment of that fee conferred no benefit on a mine operator. The *River Coal* operator had already paid the permit fee and received a permit and was then required to make an additional payment of 35 cents per ton of coal mined, for which no additional privilege or benefit was granted.

Although the bankruptcy court's factual finding that a part of the permit fee was used for operation of ODNR was correct, we think that fact is irrelevant. The apparent significance of this finding to the bankruptcy court was that it showed that the general public benefited from the payment of permit fees. One of the characteristics of a tax as opposed to a fee is that a tax is an exaction for public purposes rather than a voluntary payment for a private benefit. However, one purpose of most governmentally imposed fees is to support the agency that administers the program under which the fee is charged, presumably serving some public purpose. If this were the deciding factor, all such fees would be "taxes" for bankruptcy purposes. Where a governmental unit imposes a charge in return for bestowing an individual benefit on one who requests permission to engage in a regulated activity, the charge is a fee rather than a tax.

We have examined the authorities relied upon by ODNR to support the decisions of the bankruptcy court and the district court, but find them unpersuasive. ODNR cites *New York v. Feiring*, 313 U.S. 283, 285 (1941), where "taxes" are defined for bankruptcy purposes as "those pecuniary burdens laid upon individuals or their property, regardless of their consent, for the purpose of defraying the expenses of government or of undertakings authorized by it." That definition is helpful as far as it goes. However, the issue in *Feiring* was whether a sales tax was a "tax" for bankruptcy purposes where the bankrupt was a vendor. The argument was that a vendor merely collects sales taxes with the obligation to pay falling on his customers. Thus, the bankrupt vendor should be treated as one indebted to the governmental unit only for failure to remit taxes collected from others, so that his obligation was simply a debt for the amount of taxes collected. The Supreme Court rejected this argument and held that the sales tax was an exaction laid upon the bankrupt vendor, who had the option of passing it along to his customers. *Feiring* did not require the Court to make that distinction between governmentally imposed fees and taxes. The Supreme Court did make that distinction in *National Cable Television*, a decision relied upon in *River Coal* and in this opinion.

The judgment of the district court is affirmed in part and reversed in part. The cause is remanded with directions to enter judgment finding that proof of claim # 15 established a valid unsecured claim, entitled to no priority.

Appendix B

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re

Jenny Lynn Mining Company,
Debtor;

Gerald H. Spiers,
Trustee-Appellant,

v.

Ohio Department of Natural Resources,
Appellee.

Filed November 14, 1984

Case No. C-2-83-371

OPINION AND ORDER

This is an appeal from an order of the Bankruptcy Court. The issues presented herein are (1) whether appellee's Amended Proof of Claim No. 15 is invalid because no documentation was attached in support of the claim when it was filed, and (2) whether appellee's Amended Proof of Claim No. 15 is entitled to priority treatment, pursuant to 11 U.S.C. § 507(a)(6)(E), as an excise tax.

I. Statement of Facts

Briefly stated, the facts are as follows. Jenny Lynn Mining Company (Jenny Lynn) was formerly engaged in the strip-mining business. On February 18, 1981, Jenny Lynn filed a petition under Chapter 7 of the Bankruptcy Code. The creditors

meeting was held on March 10, 1981, at which time appellant Gerald Spiers was elected Trustee. On March 9, 1981, appellee Ohio Department of Natural Resources (ODNR) filed a Proof of Claim, denominated as a priority claim, for $59,700, which was docketed as Proof of Claim No. 3. The basis for the claim was stated as "non-payment of cash and non-depositing of surety bond or certificates of deposit required." No documentation was submitted with Proof of Claim No. 3.

On August 7, 1981, ODNR filed an amended Proof of Claim. The sole change in the claim was a decrease in the amount claimed to $42,060. The amended Proof of Claim was docketed as No. 15, and no documentation was submitted therewith. Another Amended Proof of Claim, docketed as No. 21, was filed by ODNR on March 16, 1982. Appellant Spiers filed objections to Claims Nos. 3, 15 and 21 on October 7, 1982.

On October 26, 1982, ODNR filed a request for a hearing, a memorandum contra appellant Trustee's objections to Claims 3, 15 and 21, and another Amended Proof of Claim which was docketed as No. 23. A hearing on the matter was held on December 2, 1982, after which the parties filed briefs. On February 2, 1983, the Bankruptcy Court issued its Findings, Conclusions, and Order on Objections to Claims (Order), and appellant Trustee filed his Notice of Appeal to District Court on February 11, 1983.

As stated above, the issues on appeal are (1) whether Amended Proof of Claim No. 15 is invalid because no documentation was attached in support of the claim and if not, (2) whether ODNR's Amended Proof of Claim No. 15 is entitled to priority treatment, pursuant to 11 U.S.C. § 507(a)(6)(E), as an excise tax. The Bankruptcy Court found against appellant on both issues.

Bankruptcy Rule 8013 sets out the standard of review to be followed by this Court:

> On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a

> bankruptcy court's judgment, order or decree or remand with instructions for further proceedings. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

II. Validity of Amended Proof of Claim 15

Appellant contends that Amended Proof of Claim 15 is invalid because no documentation was attached in support of the claim. Appellant asserts that Bankrupcy Rule 302(c), which was in effect prior to August 1, 1983, applies in the present case. That rule provides in pertinent part:

> Claim Founded on a Writing. When a claim, or an interest in property of the bankrupt securing the claim, is founded on a writing, the original or a duplicate shall be filed with the proof of claim
>
> . . . .

According to appellant, ODNR's claim is based on an alleged failure by the debtor to faithfully perform its contractual obligations to reclaim land after conducting strip mine operations. Therefore, in appellant's view, ODNR's claim is invalid, pursuant to Bankruptcy Rule 302(c), because the written contract upon which ODNR's claim is founded was not filed with the proof of claim.

In contrast, appellee contends that its claim is governed by Bankruptcy Rule 301, also in effect prior to August 1, 1983, which provided in part:

> (a) Form and Content; Who May Execute. A proof of claim shall consist of a statement in writing setting forth a creditor's claim and . . . shall be executed by the creditor or his authorized agent. . . .

> (b) Evidentiary Effect. A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.

Appellee's position, which was upheld by the Bankruptcy Court, is that Bankruptcy Rule 302(c) does not control because the claim was not founded upon a writing, but upon the debtor's failure to comply with statutorily prescribed strip-mining requirements. This Court agrees with appellee.

As the Bankruptcy Court noted, for many years, the State of Ohio has had among its legislative enactments statutes governing the reclamation of strip-mined land. As it existed at a time pertinent to this matter, R.C. 1513.07(A) required an operator to supply "the deposit of a surety bond, cash, or certificates of deposit as prescribed" in R.C. 1513.08(A). The purpose of the deposit was to secure "the faithful performance by the operator of all things to be done and performed by him as provided in section 1513.16 of the Revised Code, or rules or orders of the chief [of the division of reclamation] adopted or issued pursuant to that section." Any funds or certificates of deposit placed with the chief were to be delivered "to the treasurer of state who shall hold it in trust for the purposes for which it has been deposited."

R.C. 1513.16 set forth a lengthy and detailed procedure governing reclamation. Paragraph (F) provided that in cases where operators failed to fully reclaim as required, the chief was to estimate the cost to the state to perform that task, release that portion of the deposit which equalled the cost of any reclamation performed, and declare the remaining funds to be the property of the state for use in reclamation pursuant to R.C. 1513.18. R.C. 1513.18 contained the procedure to be followed in "reclaiming areas of land affected by strip mining on which the operator has defaulted." It provided, *inter alia,* that the funds from R.C. 1513.16 were to be deposited in a strip-mining reclamation special account, from which monies were to be used for reclamation projects. R.C. 1513.18 provided also:

> In the event the amount of money is not sufficient to pay the cost of doing all the reclamation work on the area of land which the operator should have done but failed to do, the attorney general shall bring an action, at the request of the chief, for the amount of money needed to complete reclamation. . . . The operator is liable for such expense in addition to any other liabilities imposed by law. Moneys so recovered shall be deposited in the strip mining reclamation fund [special account].

R.C. 1513.181 created the foregoing special account fund, and provided:

> At the end of each fiscal year an amount equal to that year's cost of the division of reclamation incurred in the administration and enforcement of Chapter 1513 of the Revised Code shall be transferred from such special account to the credit of the general revenue fund.

ODNR's Proof of Calim 15 was based upon the debtor's "[n] on-payment of cash and non-depositing of surety bond or certificates of deposit required." Appellant contends that ODNR's claim does not actually arise out of the debtor's alleged failure to pay money or post bond according to statute, but arises out of the fact that the amount of the bond which ODNR required the debtor to post did not cover all of the costs of reclamation incurred by ODNR when the debtor failed to reclaim the land, giving rise to a contractual right in ODNR to recover the excess expense from the debtor.

Regardless of which posture most accurately characterizes appellee's Proof of Claim, this Court believes that the claim is derived from statute rather than from the creation of any writing between appellee and the debtor. R.C. 1513.07 required the posting of a bond to secure faithful performance, and R.C. 1513.18 authorized taking action to recover from an operator the cost of reclaiming land not reclaimed by the

operator to the extent it exceeds any bond posted or payment made.

The Court finds that the Bankruptcy Court's conclusion that appellee's Proof of Claim 15 is not founded upon a writing, and that its validity is therefore governed solely by the provisions of Bankruptcy Rule 301, is not clearly erroneous.

II. Priority of Amended Proof of Claim 15

The Bankruptcy Court held that appellee's claim is entitled to priority treatment pursuant to 11 U.S.C. § 507(2)(6)(E) as an excise tax.

Section 507(a)(6)(E) provides that an allowed unsecured claim for an excise tax shall have priority if the tax is on:

> (i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or
>
> (ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

Appellant Trustee contends that the claim involved here is not an excise tax as that term is used in 11 U.S.C. § 507. Appellant characterizes it as a claim for a penalty or, alternatively, for a license fee, or as a claim arising from the debtor's failure to faithfully perform its duties. Appellant adds that to construe ODNR's claim as an excise tax would result in double taxation in violation of the Ohio Constitution.

Appellant's characterizations to the contrary notwithstanding, the Bankruptcy Court found that ODNR's claim was for payment of monies due under debtor's statutorily-imposed responsibility to support both reclamation and the operation of

the agency established by the state to implement reclamation, as an expense that runs with the privilege of operating a strip mine in Ohio, and as such was properly classified as an excise tax for the purposes of 11 U.S.C. § 507. This Court does not believe that the Bankruptcy Court's findings with regard to the characterization of ODNR's claim were clearly erroneous.

The Court does not agree with appellant that characterizing ODNR's claim as one for excise taxes results in double taxation in violation of the Ohio Constitution. In support of his position, appellant notes that R.C. Chapter 5749 provides for a severance tax on strip-mined coal. The tax assessed pursuant to R.C. Chapter 5749 is imposed on the coal itself, however, while the excise tax imposed by R.C. Chapter 1513 is for the state's permission to strip mine. The United States Supreme Court has held that under the Ohio Constitution "double taxation in a legal sense does not exist unless the double tax is levied upon the same property within the same jurisdiction." *Ohio Tax Cases,* 232 U.S. 576, 593-94 (1914). The Court found that payment of one tax on property and payment of another with respect to the privilege or occupation is not double taxation. *Id.* at 576. The Court believes that such is the case in the instant matter.

The Bankruptcy Court's allowance of appellee's Proof of Claim 15 in the amount of $42,060, and finding that the claim is entitled to priority, are hereby AFFIRMED.

/s/ Robert Duncan
Robert M. Duncan, Judge
United States District Court

APPENDIX C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re

Jenny Lynn Mining Company
Debtor

Filed February 2, 1983

Case No. 2-81-00666

FINDINGS, CONCLUSIONS, AND ORDER ON OBJECTIONS TO CLAIMS

This cause is before the court pursuant to notice and hearing upon objections by the Trustee to claims filed by the Department of Natural Resources of the State of Ohio (ODNR) in this Chapter 7 case.

This proceeding was commenced by the filing of debtor's voluntary petition on February 18, 1981, and a meeting of creditors was held pursuant to 11 U.S.C. § 341 on March 10, 1981.

On March 9, 1981, ODNR filed its first Proof of Claim in the amount of $59,070.00 and denominated as a priority claim. The basis for the claim was stated as "non-payment of cash and non-depositing of surety bond or certificates of deposit required." The filing was docketed as Proof of Claim No. 3, and no documentation was submitted therewith.

On August 7, 1981, ODNR filed an amended Proof of Claim. The sole change in the claim was a decrease in the amount claimed to $42,060.00. The amended Proof of Claim was docketed as No. 15, and no documentation was submitted therewith.

On March 28, 1982, ODNR filed another amended Proof of Claim. The amount claimed was $93,195.00, and the claim was this denominated as a "Priority-Tax Claim." The Proof of Claim started further that the basis for the claim was "failure to deposit cash or other security and to pay acreage fees for strip-mining as required by the Ohio Revised Code." The filing was docketed as Proof of Claim No. 21, and no documentation was submitted therewith.

On October 7, 1982, the Trustee filed objections to claims Nos. 3, 15, and 21, upon the grounds that "no documentation was attached to the proof of claim substantiating the claim," and recommended that each claim be disallowed.

On October 26, 1982, ODNR filed a third amended proof of Claim. The amount claimed was $132,822.00, and the claim was denominated as a "Priority-Full, Tax Claim." The Proof of Claim stated further that the basis for the claim was "failure to reclaim or pay for reclamation of land [debtor] strip mined or to pay acreage fee as required by Chapter 1513 of the Ohio Revised Code." A "further breakdown" set forth $35,909.00 for failure to reclaim or pay for reclamation pursuant to permit C-968; $96,698.00 for the same failures under permit C-1075; $55.00 for debtor's failure to pay an acreage fee for permit C-968; and $160.00 for failure to reclaim or pay for reclamation under permit C-944. An extensive set of documents, delineated Exhibits A through H, was submitted with the third amended Proof of Claim. Also filed by ODNR on October 26, 1982 was a request for hearing upon the Trustee's objections, and a memorandum contra the objections to claims Nos. 3, 15, and 21.

The matter was set for hearing on December 2, 1982, at which time statements of counsel were made upon the record, and a briefing schedule was established to assist the court in resolving the questions presented. ODNR filed its memorandum in support of its claims on December 8, 1982, the Trustee responded on December 27, 1982, and ODNR replied on December 30, 1982.

The principal issues framed by the parties are whether any of ODNR's Proofs of Claim are now viable and whether, if so, ODNR possesses a claim for an excise tax which is thus entitled to priority status under 11 U.s.C. § 507(a)(6)(E).

Proof of Claim No. 3, considering the time of its filing and the stated basis for the claim, was in substantial compliance with Rule 302, Rules of Bankruptcy Procedure. Where a Proof of Claim is based upon the failure to perform a state statutory act, it will not generally be found necessary to attach documentation of the enactment. Rule 302(c) states:

> Where a claim, or an interest in property of the bankrupt securing the claim, is founded upon a writing, the original or a duplicate shall be filed with the proof of claim. . .

As can be seen, where a Proof of Claim is based upon breach of a written agreement, the document must accompany the filing so the court may peruse that which the parties have executed. In the instant case, however, the failure to provide a state statutory bond is based upon a legislative enactment of which this court takes judicial notice.

Amended Proof of Claim No. 15 was also timely filed and, for the reason stated above, did not require documentation.

Amended Proof of Claim No. 21 presents a different picture. The six month limit for the filing of unsecured claims expired on September 10, 1981. Rule 301(e), Rules of Bankruptcy Procedure. Furthermore, ODNR did not avail itself of Rule 301(e)(1), which would have allowed the court to "grant a reasonable, fixed extension of time" for ODNR to file its "amended" claim. Moreover, the amount of the claim was significantly higher than the previous filings. The court is aware of authority for the proposition that Proofs of Claim may be amended. The problem with claim No. 21, however, is that it represents a new Proof of Claim as opposed to a proper change in a former Proof of Claim. Additionally, leave of court was not obtained prior to the late filing, even though the claim

had been objected to. The provisions of Rule 301, and the record at bar, compel the conclusion that "Amended" Proof of Claim No. 21 must be disallowed.

Amended Proof of Claim No. 23 was also filed improperly. Its filing was not timely, it stated a new basis (requiring documentation) for the claim, and it sought a significantly increased amount over former claims. "Amended" Proof of Claim No. 23 is, therefore, disallowed.

In its memorandum filed December 8, 1982, ODNR states that "claim number 23 is meant by the claimant to supercede the previous claims filed by the Department of Natural Resources." The suggestion is thus presented that ODNR now has no claim pending in this proceeding. If its sole claim has been disallowed, it would appear possible that such a result could obtain. The trustee, however, at page 3 of his memorandum, states that if ODNR's timely amended Proof of Claim No. 15 is found sufficient in the absence of supporting documentation, "then [ODNR] should participate as a general unsecured creditor only to the extent of forty-two thousand sixty and no/100ths dollars ($42,060.00)." Moreover, the harshness of a total denial of participation as a claimant, where ODNR has filed a valid, superseding Proof of Claim, is not warranted either by the facts or law applicable to this case. The court concludes, therefore, that ODNR has a valid Proof of Claim in this proceeding in the amoutn of $42,060.00, and the claim is allowed as unsecured.

The final issue in dispute concerns whether ODNR's claim should be accorded priority status for purposes of distribution. The parties agree that resolution of this question turns upon whether the claim is for an "excise tax," as that term is used in 11 U.S.C. § 507.

Section 507(a)(6)(E) provides that an allowed unsecured claim for an excise tax shall have priority if the tax is on:

> (i) a transaction occurring before the date of the filing of the petition for which a return, if required,

> is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or
>
> (ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

The Trustee does not question that the above, threshold requirements concerning the occurrence of a transaction have been satisfied. Rather, he asserts that the claim here involved cannot be an excise tax because of the circumstances under which the claim arose. As noted heretofore, ODNR states that the basis for its claim is the "non-payment of cash and non-depositing of surety bond or certificates of deposit required." A review of documents submitted by counsel shows that because debtor apparently failed to follow Ohio law in the conduct of its operations, it became liable to the state for certain payments. Those payments not having been made, they now form the substance of ODNR's claim.

For many years, the State of Ohio has had among its legislative enactments statutes governing the reclamation of strip-mined land. As it existed at a time pertinent hereto, R.C. 1513.07(A) required an operator to supply "the deposit of a surety bond, cash, or certificates of deposit as prescribed" in R.C. 1513.08(A). The purpose of the deposit was to secure "the faithful performance by the operator of all things to be done and performed by him as provided in section 1513.16 of the Revised Code, or rules or orders of the chief [of the division of reclamation] adopted or issued pursuant to that section." Any funds or certificates of deposit placed with the chief were to be delivered "to the treasurer of state who shall hold it in trust for the purposes for which it has been deposited."

R.C. 1513.16 set forth a lengthy and detailed procedure governing reclamation. Paragraph (F) provided that in cases where operators failed to fully reclaim as required, the chief was to estimate the cost to the state to perform that task, release that portion of the deposit which equalled the cost of

any reclamation performed, and declare the remaining funds to be the property of the state for use in reclamation pursuant to R.C. 1513.18. R.C. 1513.18 contained the procedure to be followed in "reclaiming areas of land affected by strip mining on which the operator has defaulted." It provided, *inter alia,* that the funds from R.C. 1513.16 were to be deposited in a strip-mining reclamation special account, from which monies were to be used for reclamation projects. R.C. 1513.18 provided also:

> In the event the amount of money is not sufficient to pay the cost of doing all the reclamation work on the area of land which the operator should have done but failed to do, the attorney general shall bring an action, at the request of the chief, for the amount of money needed to complete reclamation. . . The operator is liable for such expense in addition to any other liabilities imposed by law. Monies so recovered shall be deposited in the strip mining reclamation fund [special account].

R.C. 1513.181 created the foregoing special account fund, and provided:

> At the end of each fiscal year an amount equal to that year's cost of the division of reclamation incurred in the administration and enforcement of Chapter 1513 of the Revised Code shall be transferred from such special account to the credit of the general revenue fund.

It is clear from the above provisions of Ohio law that some or all of a given sum deposited by an operator, or recovered by the Attorney General from an operator, was for the expense of operating the state agency charged with responsibility for enforcement of the reclamation statutes. Stated another way, the privilege of operating a strip-mine in Ohio carried with it a statutorily imposed charge, or expense of doing business, to support both reclamation and operation of the agency established by the state to implement reclamation.

It is held universally that an excise tax is a tax imposed upon the performance of an act, the engaging in an occupation, or the enjoyment of a privilege, and that the measure of the tax is not necessarily confined to a percentage of income derived from such activities. Under the Ohio Strip-Mine Reclamation Act, the measure of the tax is tied to the meeting of responsibilities which exist concomitantly with the enjoyment of the privilege of operating a strip-mine. *Saviers v. Smith* (1920), 101 Ohio St. 132; *New York v. Feiring,* 313 U.S. 283 (1941); *In re King,* 19 Bankr. 936 (Tenn. 1982). See, also, *In re Beaman,* 9 Bankr. 539 (Oregon 1980); 51 *O. Jur.* 2d, Taxation, § 8; 71 *Am. Jur.* 2d, State and Local Taxation, § 28.

In view of all of the foregoing, the court concludes that ODNR's claim in the amount of $42,060.00 constitutes a claim of the State of Ohio based upon debtor's failure to pay an excise tax, and that such claim is entitled to priority treatment pursuant to 11 U.S.C. § 507(a)(6)(E).

IT IS SO ORDERED.

/s/ Thomas Herbert
THOMAS M. HERBERT
Bankruptcy Judge

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN THE MATTER OF

DONALD ORESTES NORTON
and
CHARLES EDWARD BAIR
individually and fdba
"TACKLE SHEDD"

EDWARD PAUL CARR, Agent
The Goodyear Hunting & Fishing Club, Inc.

Plaintiff,

v.

DONALD ORESTES NORTON
CHARLES EDWARD BAIR
individually and fdba
"TACKLE SHEDD"

Defendants-Bankrupts.

IN BANKRUPTCY NOS.
B78 - 973A and
B78 - 974A

FINDING AS TO DISCHARGEABILITY

The plaintiff, Edward Paul Carr, Agent for the Goodyear Hunting and Fishing Club, Inc. filed a complaint for determination that the debt due from the Tackle Shedd, a business individually operated by the bankrupts in Stow, Ohio, resulting

from proceeds from the sale of fishing and hunting licenses issued on behalf of the State of Ohio is nondischargeable in bankruptcy.

They allege there is $860.00 due. An answer was filed by the defendants claiming that this is not a tax due the State of Ohio and that it is dischargeable. A hearing was held and the only evidence and testimony offered was by the witness for the Goodyear Hunting and Fishing Club, Inc.

FINDING OF FACT

1. Charles Edward Bair and Donald Orestes Norton filed voluntary petitions in bankruptcy on December 18, 1978 and the First Meeting of Creditors was held on January 2, 1979.

2. The Goodyear Hunting and Fishing Club, Inc. is an agent for the Division of Wildlife, Department of Natural Resources of the State of Ohio for the sale of hunting and fishing licenses.

3. The bankrupts were deputy agents for the State of Ohio and did collect $860.00 from the sale of fishing licenses. The Deputy Agent and the authorized agents were entitled to keep $60.00 as a fee, or commission, for the sale of the licenses and the balance of $800.00 was to be remitted by the Goodyear Hunting and Fishing Club, Inc. to the Division of Wildlife of the State of Ohio.

4. Section 1533.32 of the Ohio Revised Code does provide for the authorizing of agents to issue fishing licenses and to administer oaths and take affidavits for such licenses. The statute also authorizes the agent to appoint deputy agents to perform the same act in the issuance of hunting and fishing licenses.

5. Section 1533.33 of the Ohio Revised Code provides that all monies that derive from the sale of licenses are appropriated for the use of the Department of Natural Re-

sources of the State of Ohio, except for the commission due to the deputy agent, or the authorized agent, for the issuance of licenses.

LAW

The State of Ohio pursuant to Ohio Revised Code 1533.01 to 1533.99 regulates hunting and fishing in the State of Ohio for the purposes of regulating and promoting conservation of hunting and fishing in the State of Ohio and a charge is made for hunting and fishing licenses for the purposes of public conservation. The State does appoint agents to sell fishing and hunting licenses and grants the agents authority to appoint deputy agents to perform the same duties in the sale of licenses. A benefit does accrue to the agent in the sale of the licenses as the deputies usually are owners of stores that sell hunting and fishing equipment and therefore by the sale of these licenses they bring customers into their stores.

The State of Ohio uses these funds received from the sale of licenses for the purposes of promoting hunting and fishing conservation within the State.

In the matter of *Bohm's Inc. 5 Bankr. Ct. Dec.* 259, Bankruptcy Judge Maggoire considered whether the fees collected from the sale of hunting and fishing licenses, or permits to hunt on the San Carlos Apache tribe reservation, were taxes. There was a question whether the Indian tribe was a federal instrumentality and was to be treated as a federal instrumentality for the purpose of taxation.

The Court held that the Indian reservation was a federal instrumentality with powers to tax the same as a town, city, or state. Therefore, the Court held that the hunting and fishing licenses fees were a tax and were nondischargeable in bankruptcy.

The United States Supreme Court has defined the term tax as used in Section 64 a(1) to include:

> Pecuniary burdens laid upon individuals for their property, regardless of their consent, for the purpose of defraying the expenses of government or of undertakings authorized by it. *New York v. Feirins* 313 U.S. 283, 285 (1941)

In *Collier on Bankruptcy* 14 Ed., Vol 3A paragraph 64.404[2], page 2171 the author states:

> As noted previously, some difference of opinion exists in respect to taxes levied for special purposes and segregated in separate funds, but a large majority of the courts does not consider that factor determinative.

Therefore, it is apparant that the fees that were collected within the three-year period of the filing of the bankruptcy are nondischargeable debts under Section 17a (1) of the Bankruptcy Act.

Therefore it is the conclusion of the Court that the State of Ohio would be entitled to a judgment in the amount of $800.00, which is nondischargeable under the Bankruptcy Act.

However, the Court finds that the plaintiff, the Goodyear Hunting and Fishing Club, Inc. is subrogated to the rights of the State of Ohio and they would be entitled to reimbursement out of the estate, or from the defendants, for those funds for which they are accountable as agents of the State of Ohio and said amounts would be nondischargeable. Said plaintiff Goodyear Hunting and Fishing Club, Inc. is limited to those amounts which they are actually obligated to pay to the State of Ohio.

Therefore, it is the conclusion of this Court that $800.00 of the obligation is a tax which is nondischargeable as to the State of Ohio under Section 17a(1) of the Bankruptcy Act. The balance of $60.00 is determined to be a commission earned and is not a tax and is therefore dischargeable as to the State of Ohio, and its deputy, the Goodyear Hunting and Fishing Club, Inc.

The Court finds that that part of the tax which the Goodyear Hunting and Fishing Club, Inc. is actually required to pay to the State of Ohio as its responsibility as a deputy is a nondischargeable debt as to the defendants-bankrupts.

/s/ H. F. White
H. F. White
Bankruptcy Judge

APPENDIX E

Bankruptcy Reform Act of 1978

11 U.S.C. § 507

§ 507. Priorities.

(a) The following expenses and claims have priority in the following order:

* * *

(6) Sixth, allowed unsecured claims of governmental units, to the extent that such claims are for —

* * *

(E) an excise tax on —

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

* * *

APPENDIX F

PUBLIC LAW 95--87 — AUG. 3, 1977
30 USC 1201.

FINDINGS

SEC. 101. The Congress finds and declares that—

(a) extraction of coal and other minerals from the earth can be accomplished by various methods of mining, including surface mining;

(b) coal mining operations presently contribute significantly to the Nation's energy requirements; surface coal mining constitutes one method of extraction of the resource; the overwhelming percentage of the Nation's coal reserves can only be extracted by underground mining methods, and it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground mining methods, and it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry;

(c) many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources;

(d) the expansion of coal mining to meet the Nation's energy needs makes even more urgent the establishment of appropriate standards to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public.

(e) surface mining and reclamation technology are now developed so that effective and reasonable regulation of surface coal mining operations by the States and by the Federal Government in accordance with the requirements of this Act is an appropriate and necessary means to minimize so far as practicable and adverse social, economic, and environmental effects of such mining operations;

(f) because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States;

(g) surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders;

(h) there are a substantial number of acres of land throughout major regions of the United States disturbed by surface and underground coal on which little or no reclamation was conducted, and the impacts from these unreclaimed lands impose social and economic costs on residents in nearby and adjoining areas as well as continuing to impair environmental quality;

(i) while there is a need to regulate surface mining operations for minerals other than coal, more data and analyses are needed to serve as a basis for effective and reasonable regulation of such operations;

(j) surface and underground coal mining operations affect interstate commerce, contribute to the economic well-being, security, and general welfare of the Nation and should be conducted in an environmentally sound manner; and

(k) the cooperative effort established by this Act is necessary to prevent or mitigate adverse environmental effects of present and future surface coal mining operations.

PURPOSES

SEC. 102. It is the purpose of this Act to —

(a) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations;

(b) assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations;

(c) assure that surface mining operations are not conducted where reclamation as required by this Act is not feasible;

(d) assure that surface coal mining operations are so conducted as to protect the environment;

(e) assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations;

(f) assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy;

(g) assist the States in developing and implementing a program to achieve the purposes of this Act;

(h) promote the reclamation of mined areas left without adequate reclamation prior to the enactment of this Act and which continue, in their unreclaimed condition, to substantially degrade the quality of the environment, prevent or damage the beneficial use of land or water resources, or endanger the health or safety of the public;

(j) provide a means for development of the data and analyses necessary to establish effective and reasonable regulation of surface mining operations for other minerals;

(k) encourage the full utilization of coal resources through the development and application of underground extraction technologies;

(l) stimulate, sponsor, provide for and/or supplement present programs for the conduct of research investigations, experiments, and demonstrations, in the exploration, extrac-

tion, processing, development, and production of minerals and the training of mineral engineers and scientists in the field of mining, minerals resources, and technology, and the establishment of an appropriate research and training center in various States; and

(m) wherever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations.

RECLAMATION PLAN REQUIREMENTS
30 USC 1258.

SEC. 508. (a) Each reclamation plan submitted as part of a permit application pursuant to any approved State program or a Federal program under the provisions of this Act shall include, in the degree of detail necessary to demonstrate that reclamation required by the State or Federal program can be accomplished, a statement of:

(1) the identification of the lands subject to surface coal mining operations over the estimated life of those operations and the size, sequence, and timing of the subareas for which it is anticipated that individual permits for mining will be sought;

(2) the condition of the land to be covered by the permit prior to any mining including:

(A) the uses existing at the time of the application, and if the land has a history of previous mining, the uses which preceded any mining; and

(B) the capability of the land prior to any mining to support a variety of uses giving consideration to soil and foundation characteristics, topography, and vegetative cover, and, if applicable, a soil survey prepared to section 507(b)(16); and

(C) the productivity of the land prior to mining, including appropriate classification as prime farm lands, as well as the average yield of food, fiber, forage, or wood products from such lands obtained under high levels of management;

(3) the use which is proposed to be made of the land following reclamation, including a discussion of the utility and capacity of the reclaimed land to support a variety of alternative uses and the relationship of such use to existing land use policies and plans, and the comments of any owner of the surface, State and local governments or agencies thereof which would have to initiate, implement, approve or authorize the proposed use of the land following reclamation;

(4) a detailed description of how the proposed postmining land use is to be achieved and the necessary support activities which may be needed to achieve the proposed land use;

(5) the engineering techniques proposed to be used in mining and reclamation and a description of the major equipment; a plan for the control of surface water drainage and of water accumulation; a plan, where appropriate, for backfilling, soil stabilization, and compacting, grading, and appropriate revegetation; a plan for soil reconstruction, replacement, and stabilization, pursuant to the performance standards in section 515(b)(7)(A), (B), (C), and (D), for those food, forage, and forest lands identified in sections 515(b)(7); an estimate of the cost per acre of the reclamation, including a statement as to how the permittee plans to comply with each of the requirements set out in section 515;

(6) the consideration which has been given to maximize the utilization and conservation of the solid fuel resource being recovered so that reaffecting the land in the future can be minimized;

(7) a detailed estimated timetable for the accomplishment of each major step in the reclamation plan;

(8) the consideration which has been given to making the surface mining and reclamation operations consistent with surface owner plans, and applicable State and local land use plans and programs;

(9) the steps to be taken to comply with applicable air and water quality laws and regulations and any applicable health and safety standards;

(10) the consideration which has been given to developing the reclamation plan in a manner consistent with local physical environmental, and climatological conditions;

(11) all lands, interests in lands, or options on such interests held by the applicant or pending bids on interests in lands by the applicant, which lands are contiguous to the area to be covered by the permit;

(12) the results of test boring which the applicant has made at the area to be covered by the permit, or other equivalent information and data in a form satisfactory to the regulatory authority, including the location of subsurface water, and an analysis of the chemical properties including acid forming properties of the mineral and overburden: *Provided,* That information which pertains only to the analysis of the chemical and physical properties of the coal (excepting information regarding such mineral or elemental contents which is potentially toxic in the environment) shall be kept confidential and not made a matter of public record;

(13) a detailed description of the measures to be taken during the mining and reclamation process to assure the protection of:

(A) the quality of surface and ground water systems, both on- and off-site, from adverse effects of the mining and reclamation process;

(B) the rights of present users to such water; and

(C) the quantity of surface and ground water systems, both on- and off-site, from adverse effects of the mining and reclamation process or to provide alternative sources of water where such protection of quantity cannot be assured;

(14) such other requirements as the regulatory authority shall prescribe by regulations.

(b) Any information required by this section which is not on public file pursuant to State law shall be held in confidence by the regulatory authority.

PERFORMANCE BONDS
30 USC 1259.

SEC. 509. (a) After a surface coal mining and reclamation permit application has been approved but before such a permit is issued, the applicant shall file with the regulatory authority, on a form prescribed and furnished by the regulatory authority, a bond for performance payable, as appropriate, to the United States or to the State, and conditional upon faithful performance of all the requirements of this Act and the permit. The bond shall cover that area of land within the permit area upon which the operator will initiate and conduct surface coal mining and reclamation operations within the initial term of the permit. As succeeding increments of surface coal mining and reclamation operations are to be initiated and conducted within the permit area, the permittee shall file with the regulatory authority an additional bond or bonds to cover such increments in accordance with this section. The amount of the bond required for each bonded area shall depend upon the reclamation requirements of the approved permit; shall reflect the probable difficulty of reclamation giving consideration to such factors as topography, geology of the site, hydrology, and revegetation potential, and shall be determined by the regulatory authority. The amount of the bond shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture and in no case shall the bond for the entire area under one permit be less than $10,000.

(b) Liability under the bond shall be for the duration of the surface coal mining and reclamation operation and for a period coincident with operator's responsibility for revegetation requirements in section 515. The bond shall be executed by the operator and a corporate surety licensed to do business in the State where such operation is located, except that the operator may elect to deposit cash, negotiable bonds of the United States Government or such State, or negotiable certificates of deposit of any bank organized or transacting business in the United States. The cash deposit or market value of such securities shall be equal to or greater than the amount of the bond required for the bonded area.

(c) The regulatory authority may accept the bond of the applicant itself without separate surety when the applicant demonstrates to the satisfaction of the regulatory authority the existence of a suitable agent to receive service of process and a history of financial solvency and continuous operation sufficient for authorization to self-insure or bond such amount or in lieu of the establishment of a bonding program, as set forth in this seciton, the Secretary may approve as part of a State or Federal program an alternative system that will achieve the objectives and purposes of the bonding program pursuant to this section.

(d) Cash or securities so deposited shall be deposited upon the same terms as the terms upon which surety bonds may be deposited. Such securities shall be security for the repayment of such negotiable certificate of deposit.

(e) The amount of the bond or deposit required and the terms of each acceptance of the applicant's bond shall be adjusted by the regulatory authority from time to time as affected land acreages are increased or decreased or where the cost of future reclamation changes.

APPENDIX G

OHIO REVISED CODE

HISTORY: 137 v H 1081. Eff 8-2-78.

§ 1513.07 [Strip mining permit.]

(A) No licensed operator shall conduct a strip mining operation without a permit for such operation issued by the chief of the division of reclamation. The chief shall issue an order granting a permit upon the approval by him of an application, as required by this section, payment of a permit fee in an amount equal to the product of fifty dollars multiplied by the number of acres, estimated in the application, which will comprise the area of land affected within the permit period by the strip mining operation for which the permit is requested, and the deposit of a surety bond, cash, or certificates of deposit as prescribed by division (A) of section 1513.08 of the Revised Code for the number of acres that the operator states in his application that will be affected during the first year of operation under the permit. However, the chief shall issue an order denying a permit if he finds that the applicant, any partner if the applicant is a partnership, any officer or director if the applicant is a corporation, or any other person who has a right to control or in fact controls the management of the applicant or the selection of officers, directors, or managers of the applicant has substantially or materially failed to comply with Cahpter 1513. of the Revised Code, which failure may consist of one or more violations thereof, a rule adopted thereunder, or any order of the chief, and the chief shall revoke the license of any person who purposely misrepresents or omits any material fact in the application for the permit or an amendment to a permit.

An application for a permit shall be upon such form as the chief prescribes and provides, and shall contain:

(1) The name, address, and business telephone number of the applicant, and the license number issued the applicant under section 1513.06 of the Revised Code;

(2) A description of the land upon which the applicant proposes to engage in a strip mining operation, which description shall set forth: the name of the counties, townships, and municipal corporations, if any, in which the land is located; the location of its boundaries; and a description of the land of sufficient certainty that it may be located and distinguished from other lands;

(3) An estimate of the number of acres of land which will comprise the area of land to be affected within each year for which the permit is requested, the number of acres of land affected within each year that constitute prime farmland, the number of acres within the permit area on which steep slope mining operations will be performed, and the number of acres on which mountaintop removal will be performed;

(4) The name and address of the owner of surface rights in the land upon which the applicant proposes to engage in strip mining;

(5) A copy of the deed, lease, or other instrument which authorizes entry upon such land by the applicant or his agents, if surface rights in the land are not owned by the applicant;

(6) A statement of whether any strip mining permits are now held by the applicant in this state, and if so, the numbers of the permits;

(7) A report of testing in the area of land to be affected, which shall include the location of test boring holes in the area and the results of the test borings, including the nature and depth of overburden and material underlying the coal seam, the thickness of the seam, and the crop line of the seam. All information relating to test borings required by this section shall be kept confidential and not made a matter of public record, except that the information may be disclosed by the chief in any legal action in which the truthfulness of the information is material.

(8) A complete plan for mining and reclaiming the area of land to be affected, which shall include a statement of the intended future use of the area, which may include water impoundments, water-oriented real estate developments, recreational area development, commercial or industrial site development, sanitary landfill, or agricultural development,

with a full explanation of the intended economic or public use of the affected area. The chief shall approve the completed plan except for additional backfilling, grading, resoiling, and planting requirements not inconsistent with the intended future use, if he finds on the basis of the evidence presented to him that the proposed contour and condition of the land for the proposed use will place the land so as to have an equal or higher economic or public use than if the area were to be reclaimed by contouring, that the recharge capacity of the mined area will be restored to approximate premining conditions, that the steepest highwall slope and other grading is not greater than thirty-five degrees except as necessary for the intended future use, that the plan does not pose an actual or potential threat of water pollution or diminution, or detrimental environmental impact, and that it is not impractical or unreasonable, will not involve unreasonable delay in its implementation, and is not inconsistent with applicable land use policies and plans, that is, proposed post-reclamation land uses would not violate the applicable zoning ordinance or regulation, and the plan is not in violation of any other federal, state, or local law; a description of the methods and practices the applicant intends to employ in strip mining and to prevent pollution or diminution of waters of the state, erosion, deposition of sediment, landslides, accumulation or discharge of acid water, flooding, and to restore the recharge capacity of the mined area to approximate premining conditions; a description of the backfilling, grading, resoiling, planting, and other reclamation to be done; and a time schedule for completion of each of these phases which includes distances at which reclamation shall follow mining. The plan may be amended by the operator with the approval of the chief by filing an amended plan. Within sixty days of receiving an amended plan, the chief shall issue an order approving or disapproving it. The chief shall disapprove any plan or amended plan which does not provide for the immediate establishment of covering by grasses, legumes, or similar plants in order to prevent soil erosion, including a preliminary planting of such cover in areas which are to be planted in trees. The chief may approve additional vegetation compatible with such plan and purpose. The chief shall disapprove any

plan or amended plan which fails to provide reclamation as required by Chapter 1513. of the Revised Code, or which would result in pollution or diminution of waters of the state, substantial erosion, substantial deposition of sediment, landslides, accumulation or discharge of acid water, or flooding, or which would not restore the recharge capacity of the mined area to approximate premining conditions.

(9) An estimate of the cost of reclamation per acre;

(10) A map, in quadruplet, on a scale of not more than four hundred feet to the inch or four copies of an enlarged United States geological survey topographic map on a scale of not more than four hundred feet to the inch.

The map shall:

(a) Be prepared and certified by a professional engineer or surveyor registered in this state;

(b) Identify the area of land to be affected corresponding to the application;

(c) Show the probable limits of subjacent and adjacent deep mining operations, whether active, inactive, or mined out;

(d) Show the boundaries of the total area of land to be affected, the estimate of the area of land to be affected during each year of the operation, and name the surface and mineral owners of record of the area, and the owners of record of surface properties within five hundred feet of the area;

(e) Show the names and locations of all streams, creeks, or other bodies of water, roads, railroads, utility lines, buildings, cemeteries, and oil and gas wells, on the area of land to be affected and within five hundred feet of the area;

(f) Show the counties, municipal corporations, townships, and sections in which the area of land to be affected is located;

(g) Show the drainage plan on, above, below, and away from the area of land to be affected, indicating the directional flow of water, constructed drainways, natural waterways used for drainage, and the streams or tributaries receiving or to receive this discharge;

(h) Show the location of test borings which the operator has conducted on the area of land to be affected;

(i) Show the date on which the map was prepared, the north point and the quadrangle sketch, and the exact locatioin of the operation;

(j) Show the type, kind, location, and references of all existing boundary, section corner, government, and other survey monuments within the area to be affected and within five hundred feet of the area;

(k) Identify the number of acres of land affected within each year that constitute prime farmland;

(l) Identify the number of acres within the permit area on which steep slope mining operations will be performed;

(m) Identify the number of acres within the permit area on which mountaintop removal will be performed.

The certification of the maps shall read:

"I, the undersigned, hereby certify that this map is correct, and shows to the best of my knowledge and belief all the information required by the strip mining laws of the state." The certification shall be signed and attested before a notary public. The chief may reject any map as incomplete if its accuracy is not sc certified and attested.

(B) No permit application or amendment shall be approved by the chief if he finds that the reclamation described in the application will not be in full compliance with Chapter 1513. of the Revised Code and rules adopted thereunder, or that there is not reasonable cause to believe that reclamation as required by Chapter 1513. of the Revised Code will be accomplished, or if he finds that part or all of the permit area constitutes prime farmland unless he finds that the application complies with specifications for soil removal, storage placement, and reconstruction established for such prime farmland by the chief of the division of reclamation.

The chief shall issue an order denying the application for a permit or an amendment if he determines that any measure set forth in the plan for mining and reclamation is likely to be inadequate to prevent damage to adjoining property or to achieve any reclamation requirement of this chapter.

If the chief finds that any part of the area of land to be affected described in an application for a permit or amendment is such that experience with a similar type of operation upon similar land shows that the measures to be taken under

the applicant's complete plan for mining and reclaiming the area would not prevent pollution or diminution of waters of the state, substantial erosion, substantial deposition of sediment, landslides, accumulation or discharge of acid water, and flooding, or fail to resotre the recharge capacity of the mined area to approximate premining conditions, the chief shall issue an order denying a permit for that part of the land. Such order shall describe the area of land for which the permit is denied. The chief shall issue a permit for that part of the land for which the permit was not so denied.

No permit application or amendment shall be approved to strip mine land adjacent to a public road in violation of section 4153.11 of the Revised Code, or in violation of a rule adopted by the chief under division (B) of section 1513.02 of the Revised Code, in accordance with Chapter 119. of the Revised Code.

To assure adequate lateral support, no permit application or amendment shall be approved to strip mine, except by auger method or a similar method, land closer than fifty fee of horizontal distance to any adjacent land or waters in which the operator making application does not own the surface or mineral rights, unless the owners of the surface and mineral rights in and under the adjacent land or waters consent in writing to strip mining closer than fifty feet of horizontal distance. Such consent, or a certified copy thereof, shall be attached to the application as a part of the permanent record of the application for a strip mining permit.

(C) No permit may be issued unless the operator holds a valid strip mining license. If at any time the permittee has his license revoked, all permits authorized under that license shall thereupon by order be revoked.

(D) The chief shall issue an order granting or denying a permit within the prescribed period after receipt of a complete application and the required fee and bond, cash, or certificates of deposit. If he approves the application, the order granting the permit shall authorize the permittee to engage as the operator of a strip mining operation upon the land described in the application for three years from the date of issuance. If the chief denies the permit, he shall state the reasons for denial in the order denying the permit.

(E) If an operator engaged in a strip mining operation for which a permit has been issued has not completed mining the area and desires to continue the operation without interruption after the end of his existing permit period on a part of the land described in his permit, or in an amendment to that permit, he shall file with the chief, at least sixty days before the end of his existing permit period, an application for a permit for such land for the three years immediately following the expiration date of his existing permit. The operator may continue such operation without interruption after the end of his existing permit period even though the permit for which he so applied has not been issued to him by the chief, and such operator shall not be held to be in violation of this section or section 1513.17 of the Revised Code, if such operator's failure to have such a permit results merely from the chief's failure to act upon the application. An operator may continue mining such operation without a permit only until such time as the chief issues an order granting or denying the permit. Any order denying such new permit shall require the operator to stop all operations immediately.

(F) If, at any time within the period for which an operator has been issued a permit to engage in a strip mining operation upon land described in his application for a permit, the operator desires to engage in a strip mining operation on land not described in his application, but contiguous to the land described in his application, he may file with the chief an application for an amendment to his permit. The chief shall issue an order approving or disapproving such an amendment within the prescribed period after receipt of the complete application for the amendment and the required fee and bond, cash, or certificates of deposit. Before approving an amendment, the chief shall require the information, maps, and fees as required for an original application under this section, and the bond, cash, or certificates of deposit as required under division (B) of section 1513.08 of the Revised Code, and shall apply the same prohibitions and restrictions applicable to land described in an original application for a permit. If the chief disapproves the amendment, he shall state the reasons for disapproval in the order disapproving the amendment. Upon the approval of an amendment by the chief, the operator shall

be authorized to engage in strip mining during the balance of the period for which the original permit was issued on the land described in his original application plus the land described in the amendment.

(G) If the chief fails to act within the time prescribed in this section, it shall be conclusively presumed that he has approved the application for a permit or amendment thereto.

OHIO REVISED CODE
Section 1513.08, effective 10/10/75 from Page 1978

§ 1513.08 Operator's surety bond.

(A) The surety bond referred to in division (A) of section 1513.07 of the Revised Code, relating to original applications, shall be upon such form as the chief of the division of reclamation prescribes and provides, and shall be signed by the operator as principal, and by a surety company authorized to transact business in the state as surety. Such bond shall be payable to the state and shall be conditioned upon the faithful performance by the operator of all things to be done and performed by him as provided in section 1513.16 of the Revised Code, or rules or orders of the chief adopted or issued pursuant to that section. The bond shall be for the payment of an amount of money equal to the estimated cost to the state to perform reclamation required by section 1513.16 of the Revised Code in case of default by the operator. No such surety bond shall be for the payment of an amount of money less than five thousand dollars. The amount of the bond shall be determined by order of the chief. Such order may be appealed, either in whole or in part, by the operator. The operator may deposit with the chief, in lieu of surety bond, cash in an amount equal to the surety bond as prescribed in this division of this section, or negotiable certificates of deposit issued by any bank organized or transacting business in this state or certificates of deposit issued by any building and loan association as defined in section 1151.01 of the Revised Code having a cash value equal to or greater than the amount of the surety bond as prescribed in this division of this section. Cash or certificates of deposit shall be deposited upon the same terms as the terms upon which surety bonds may be deposited. If one or more certificates of deposit are deposited with the chief in lieu of surety bond, he shall require the bank or building and loan association which issued any such certificate to pledge securities of a cash value equal to the amount of the certificate, or certificates, which is in excess of the amount insured by any of the agencies and instrumentalities created by or under the following acts and amendments thereto:

(1) Federal Deposit Insurance Corporation, 65 Stat. 873, 12 U.S.C. 1811;

(2) Federal Savings and Loan Insurance Corporation, 48 Stat. 1256, 12 U.S.C. 1726;

(3) Deposit guaranty association, sections 1151.80 to 1151.92 of the Revised Code. Such securities shall be security for the repayment of the certificate of deposit.

Immediately upon a deposit of cash or certificates with the chief, he shall deliver it to the treasurer of state who shall hold it in trust for the purposes for which it has been deposited. The treasurer of state shall be responsible for the safekeeping of such deposits. An operator making a deposit of cash or certificates of deposit may withdraw and receive from the treasurer of state, on the written order of the chief, all or any part of the cash or certificates in the possession of the treasurer of state cash or negotiable certificates of deposit issued by any bank organized or transacting business in this state or certificates of deposit issued by any building and loan association equal in value to the value of the cash or certificates withdrawn. An operator may demand and receive from the treasurer of state all interest or other income from any certificates as it becomes due. If certificates deposited with and in the possession of the treasurer of state mature or are called for payment by the issuer thereof, the treasurer of state, at the request of the operator who deposited them, shall convert the proceeds of the redemption or payment of the certificates into such other negotiable certificates of deposit issued by any bank organized or transacting business in this state, or such other certificates of deposits issued by any building and loan association, or cash, as may be designated by the operator.

(B) The surety bond referred to in division (F) of section 1513.07 of the Revised Code relating to amendments to a permit shall be upon such form as the chief of the division of reclamation prescribes and provides, and shall be signed by the operator as principal and by a surety company authorized to transact business in the state as surety. Such bond shall be payable to the state and shall be conditioned upon the faithful performance by the operator of all things to be done and performed by him as provided in section 1513.16 of the Revised Code or rules or orders of the chief adopted or

issued pursuant to that section. The bond shall be for the payment of an amount of money equal to the estimated cost to the state to perform reclamation required by section 1513.16 of the Revised Code, in case of default by the operator. The amount of the bond shall be determined by order of the chief. Such order may be appealed, either in whole or in part, by the operator.

The operator may deposit with the chieff in lieu of surety bond, cash in an amount equal to the surety bond as prescribed in this division of this section, or negotiable certificates of deposit issued by any bank organized or transacting business in this state; or certificates of deposit issued by any building and loan association having a cash value equal to or greater than the amount of such surety bond. Cash or certificates deposited shall be deposited upon the same terms as the terms upon which such surety bonds may be deposited. Cash or certificates deposited with the chief shall be delivered by him to the treasurer of state, and the treasurer of state shall hold such cash and certificates and make disposition thereof in accordance with the provisions contained in division (A) of this section pertaining to cash or certificates delivered to the treasurer of state as therein provided.

OHIO REVISED CODE
Effective: April 9, 1981

§ 1513.08 Bonds.

(A) After a coal mining and reclamation permit application has been approved but before the permit is issued, the applicant shall file with the chief of the division of reclamation, on a form prescribed and furnished by the chief, a bond for performance payable, as appropriate, to the state and conditional upon faithful performance of all the requirements of this chapter and the permit. The bond shall cover that area of land within the permit area upon which the operator will initiate and conduct coal mining and reclamation operations within the initial term of the permit. As succeeding increments of coal mining and reclamation operations are to be initiated and conducted within the permit area, the permittee shall file with the chief an additional bond or bonds to cover the increments in accordance with this section. The amount of the bond shall be two thousand five hundred dollars per acre or portion thereof. The minimum amount of bond furnished shall be ten thousand dollars. In the event of forfeiture of a bond, and the bond is insufficient to complete the reclamation the chief shall complete the reclamation in accordance with section 1513.18 of the Revised Code using funds from the reclamation special account.

There is hereby created the reclamation special account in the state special revenue fund to be used by the chief of the division of reclamation to reclaim permit areas upon which any bond has been forfeited before or after the effective date of this section in accordance with section 1513.18 of the Revised Code. Initially, the special account shall consist of moneys transferred to it from the unreclaimed lands special account created in section 1513.30 of the Revised Code. Thereafter, as funds are spent from the reclamation special account, the auditor of state, upon the certification of the chief, shall transfer such additional funds from the unreclaimed lands special account to keep the balance of the reclamation special account at two million dollars; however, after the initial funding of the special account, the auditor of state shall not

transfer more than five hundred thousand dollars to the reclamation special account during any fiscal year.

(B) Liability under the bond shall be for the duration of the coal mining and reclamation operation and for a period coincident with operator's responsibility for revegetation requirements in section 1513.16 of the Revised Code. The bond shall be executed by the operator and a corporate surety licensed to do business in this state, except that the operator may elect to deposit cash, negotiable bonds of the United States or this state, or negotiable certificates of deposit of any bank or savings and loans organized or transacting business in the United States. The cash deposit or market value of the securities shall be equal to or greater than the amount of the bond required for the bonded area.

(C) The chief may accept the bond of the applicant itself without separate surety when the applicant demonstrates to the satisfaction of the chief the existence of a suitable agent to receive service of process and a history of financial solvency and continuous operation sufficient for authorization to self-insure or bond the amount.

(D) Cash or securities so deposited shall be deposited upon the same terms as the terms upon which surety bonds may be deposited. The securities shall be security for the repayment of such negotiable certificate of deposit.

(E) The amount of the bond or deposit required and the terms of each acceptance of the applicant's bond shall be adjusted by the chief from time to time as affected land acreages are increased or decreased.

OHIO REVISED CODE
HISTORY: 137 v H 1081. Eff 8-2-78.

§ 1513.09 Operator's report.

(A) The chief of the division of reclamation may require progress maps from the operator upon thirty days' notice to the operator. A progress map shall contain information specified by the chief. If, upon the receipt of a progress map, the chief determines that the area of land to be affected within the permit area by an operator during the current twelve-month period would exceed the number of acres for which bond has been deposited he may issue an order requiring the operator to deposit bond for the number of acres the chief determines will be affected within the permit area during the current twelve-month period in excess of the number of acres for which bond has been posted.

(B) Within thirty days after each anniversary date of the issuance of a strip mining permit, the operator shall file with the chief an annual report, on a form to be prescribed and furnished by the chief, which report shall, for the period covered by the report, contain:

(1) The amount of coal produced;

(2) The number of acres affected and the number of acres reclaimed;

(3) A description of the are of land affected and the area of land reclaimed by the operation within the period of time covered by the report with sufficient certainty so that these areas may be located and distinguished from other land;

(4) An estimate of the number of acres to be affected during the next year of operation. An annual report is not required to be filed if a final report is filed in lieu thereof.

Each annual report shall be accompanied by a map describing the exact area of land affected during the period of the report and the location of the area of land estimated to be affected during the next year of operation. The map shall be prepared in accordance with and contain all information required by division (A)(10) of section 1513.07 of the Revised Code.

With each annual report the operator shall file a surety bond, cash, or certificates of deposit as prescribed by division

(A) of section 1513.08 of the Revised Code for the number of acres estimated to be affected during the next year of operation under the permit, for which no surety bond, cahs, or certificates of deposit were previously filed and for the number of acres affected during the preceding year of operation under the permit for which no surety bond, cash, or certificates of deposit were filed.

(C) Within thirty days after the expiration of a strip mining permit, or within thirty days after the operation for which a permit was issued has been completed or abondoned, whichever occurs earlier, an operator shall submit a final report containing the same information required in the annual report, but covering the entire period of time of operation under the permit, and a final map which contains all information required by division (A) (10) of section 1513.07 of the Revised Code, describing the exact area of land affected during each year of the operation.

In the event such final report and map shows that the number of acres of land comprising the area of land comprising the area of land affected is larger than the number of acres for which the operator has deposited a surety bond, cash, or certificates of deposit to ensure reclamation as required by section 1513.16 of the Revised Code, and by rules or orders of the chief adopted or issued pursuant thereto, such report shall be accompanied by an additional surety bond, cash, or negotiable certificates of deposit issued by any bank organized or transacting business in this state in an amount equal to the estimated cost to the state to perform reclamation required by section 1513.16 of the Revised Code in case of default by the operator. The amount of the bond, cash, or certificates shall be determined by order of the chief. Such order may be appealed, either in whole or in part, by the operator. Such final report shall also be accompanied by an additional permit fee in such amount as is equal to the amount of fifty dollars multiplied by that number which is equal to the difference between the number of acres in the area of land affected as shown by such report and the number of acres of land for which the operator has theretofore paid to the chief a permit fee in connection with the permit authorizing the operation covered by such report. The deposit of such additional surety

bond, cash, or certificates shall be upon the same terms as the terms of the deposit of the surety bond, cash, or certificates shall be upon the same terms as the terms of the deposit of the surety bond, cash, or certificates which were deposited by the operator at the time of the issuance of the permit authorizing the operation covered by said report. The chief shall immediately deliver such additional cash or certificates to the treasurer of state, to be held by him upon the same terms as the terms under which he holds cash or certificates under section 1513.08 of the Revised Code. The deposit of such additional bond, cash, or certificates of deposit and payment of such additional fees in no way absolves an operator from the penalty for violation of division (B) of section 1513.17 of the Revised Code.

OHIO REVISED CODE
HISTORY: 137 v H 1081. Eff 8-2-78.

§ 1513.16 Reclamation by operator.

(A) Within three months after removal of overburden, the operator shall commence backfilling, grading, resoiling, and other work, except planting, on the area of land affected by such removal. Such work shall be completed within twelve months after the end of the permit year within which the area of land was affected, or within twelve months after the operation is terminated, completed, or abandoned, whichever occurs first. Whenever possible, the chief of the division of reclamation shall require backfilling, grading, resoiling, and other work, including planting, as mining progresses. In any case, planting shall take place not later than the next appropriate season for such planting following the completion of backfilling, grading, resoiling, and other work, as required by this section.

If the chief finds that the operator cannot comply with the time limits of this section because of a labor dispute, the chief may extend them for the period of time lost.

The chief may extend the time limits of this division for periods of not more than one year at a time, if the operator needs more time than that otherwise allowed under this division for the purpose of removing limestone, clay, or shale which was uncovered by strip mining, if the operator is in a business which substantially utilizes limestone, clay, or shale, and if the chief determines that the operator has a bona fide need for the extension of time in order to carry out limestone, clay, or shale removal. Removal of limestone, clay, and shale shall be performed under rules adopted by the chief for the purpose of ensuring compliance with the requirements and objectives of this chapter. An extension of time made under this division shall not delay reclamation on any part of the area of land affected for which the extension is not necessary in order to carry out the limestone, clay, or shale removal.

(B) While mining and reclaiming, an operator shall:

(1) Conspicuously post at each entrance to the operation a sign which clearly shows the name, business address, and telephone number of the operator and the permit and license number of the operation. The sign shall be at least three feet by three feet in size.

(2) Except as provided in division (B)(3) of this section, remove the topsoil from the land in a separate layer and segregate the topsoil in a separate pile until needed so that the soil is kept in a usable condition for sustaining vegetation, unless other soil placement procedures or soil conditioning, as may be necessary to better establish and maintain vegetation in the area of land affected, have been approved by the chief;

(3) Identify and segregate the various horizons of the natural soil of all acreage constituting prime farmland, and store and regrade the natural soil in such a way to ensure within a reasonable time, restoration of the prime farmland area to a level equivalent to or higher than the yield of nonmined prime farmland in the surrounding area under equivalent levels of management;

(4) Cover immediately with nontoxic material any toxic material, roof coal, pyritic shale, or other material determined by the chief to be acid-producing, toxic, or creating a fire hazard, and bury such toxic material under adequate fill. Before completion of reclamation the operator shall remove or bury any metal, lumber, equipment, or other refuse resulting from the mining, and dismantle and remove all abondoned or useless structures.

(5) Construct and maintain access roads and fire lanes in the affected area, when required to do so by rule, order of the chief, or the plan for mining and reclamation required as part of the application;

(6) Prevent pollution or diminution of waters of the state, substantial erosion, substantial deposition of sediment, landslides, accumulation or discharge of acid water, and flooding, restore the recharge capacity of the mined area to approximate premining conditions, and shall maintian ditches, dikes, pumps, and other drainage facilities necessary to prevent acid water from draining into or accumulating in the pit.

(7) Design, locate, construct, operate, maintain, enlarge, modify, and remove or abandon, in accordance with rules adopted by the chief, all existing and new coal mine waste piles consisting of mine waste, tailings, coal processing wastes, or other liquid or solid waste, which are used either temporarily or permanently as dams or embankments.

(8) Ensure that when performing strip mining on steep slopes, no debris, abandoned or disabled equipment, spoil material, or waste mineral matter be placed on the downslope below the bench or mining cut and that excess spoil material be permanently stored in accordance with rules adopted by the chief. The operator may not disturb any land above the top of the highwall unless the chief finds that such disturbance will facilitate reclamation and that any such disturbance will be limited to that amount necessary to facilitate the reclamation. However, the standards of this division do not apply where mining is done on a flat or gently rolling terrain with an occasional steep slope through which mining proceeds and leaves a plain or predominantly flat area or where mining is governed by division (B)(9) of this section.

(9) Ensure when performing mountaintop removal that:

(a) The toe of the lowest coal seam and the overburden associated with it are retained in place as a barrier to slides and erosion;

(b) The reclaimed area is stable;

(c) The resulting plateau or rolling contour drains inward from the outslopes except at specified points;

(d) No damage will be done to natural watercourses;

(e) Spoil will be placed on the mountaintop bench as is necessary to achieve the planned postmining use and all excess spoil material not retained on the mountain top shall be placed in accordance with rules adopted by the chief in accordance with Chapter 119. of the Revised Code;

(f) Ensure stability of the spoil retained ont he mountaintop.

(C) An operator shall mine and reclaim the area of land affected in accordance with the plan for mining and reclaiming approved by the chief in the operator's application for a permit. In the process of reclamation, the operator shall:

(1) Contour the area of land affected, unless the plan for mining and reclaiming approved by the chief under division (A)(8) of section 1513.07 of the Revised Code provides for terracing or for use of the area of land affected for water impoundments, water-oriented real estate developments, recreational area development, commercial or industrial site development, sanitary landfill, agricultural development, or

mountaintop removal, in which case the operator shall comply with the plan as approved by the chief. If contouring of the are of land affected presents, in the opinion of the chief, a danger that soil erosion or acid water drainage will occur before the planned vegetation will grow, or other natural conditions will not permit contouring, the operator shall backfill and grade according to a plan of terracing and drainage approved by the chief that will eliminate such danger. Approval of terracing shall not be construed as reducing the responsibility of an operator to prevent stream pollution. A body of water may be formed if its formation will not result in siltation, acid water accumulation, or acid water drainage, and if the mining and reclamation plan prescribes formation of a body of water. No body of water shall be less than six feet deep, measured from the law water mark, except that the chief may approve a lesser depth for the purpose of waterfowl refuge and habitat if this portion of the plan is properly planned and desirable from the standpoint of wildlife management. The bank abutting at least half the perimeter of a body of water shall be graded to the water line at a uniform grade not steeper than fifteen degrees extending back from the water at least twelve feet.

(2) Replace the topsoil which has been segregated, unless the chief has approved or required other soil placement or soil conditioning, including the application of soil amendments, as necessary to sustain vegetation, in which case such procedures shall be followed. There shall be no rocks or other materials within the topsoil or subsoil of any size which would impede any intended future use of the area as set forth in the application for permit or for an amendment to a permit.

(3) Plant and grow vegetative covering as required by the mining and reclamation plan approved by the chief.

(4) Reestablish all boundary, section corner, government, and other survey monuments which were removed by the operator.

(D) When the reclamation other than planting of the area of land affected as shown on an annual or final map is completed, the operator shall file a request on a form provided by the chief, for inspection of the area. The request shall state:

(1) The location of the area and number of acres;

(2) The license number and permit number;

(3) The amount of bond, cash, or certificates of deposit on deposit to assure reclamation of such area;

(4) The results of tests on the soil of the reclaimed area for such vegetation-sustaining factors as the chief shall prescribe by rule.

The chief shall make an inspection and evaluation of the reclamation of the area within the prescribed period after receipt of the request or, if the operator fails to complete the reclamation or file the request as required, as soon as the chief learns of such default. Thereupon, if the chief approves the reclamation other than planting as meeting the requirements of Chapter 1513. of the Revised Code, rules adopted thereunder, any orders issued during the mining or reclamation, and the specifications of the plan for mining and reclaiming, he shall issue an order to the operator and the operator's surety releasing them from liability for one-half the total amount of their surety bonds on deposit to assure reclamation for the area upon which reclamation is completed. If the operator has deposited cash or certificates of deposit in lieu of a surety bond to assure reclamation, the chief shall issue an order to the operator releasing one-half of the total amount so held, and shall promptly transmit a certified copy of such order to the treasurer of state. Upon presentation of the order to the treasurer by the operator to whom it was issued, or by the operator's authorized agent, the treasurer shall deliver to the operator or the operator's authorized agent the cash or certificates of deposit designated in the order.

If the chief does not approve the reclamation other than planting, he shall notify the operator by certified mail within the prescribed period after the request for inspection is filed or after he learns of the default. The notice shall be an order stating the reasons for unacceptability, ordering further actions to be taken, and setting a time limit for compliance. If the chief does not notify the operator within the prescribed period after a request for inspection is filed that he has not approved the reclamation, it shall be conclusively presumed that the chief has approved the reclamation other than planting. If the operator does not comply with the order within the time limit specified, the chief may order an extension of time for compliance, if he determines that the operator's non-

compliance is for good cause, resulting from developments partially or wholly beyond the operator's control. If the operator complies within the time limit or the extension of time granted for compliance, the chief shall order release of bond, cash, or certificates of deposit in the same manner as in the case of approval of reclamation other than planting by the chief, and the treasurer shall proceed as in such case. If the operator does not comply within the time limit and the chief does not order an extension, or if the chief orders an extension of time and the operator does not comply within the extension of time granted for compliance, the chief shall issue another order declaring that the operator has failed to reclaim and, if the operator's permit has not already expired or been revoked, revoking the operator's permit. The chief shall thereupon proceed under division (F) of this section.

(1) The location of the area and number of acres;

(2) The license number and permit number;

(3) The amount of bond, cash, or certificates of deposit on deposit to assure reclamation of such area;

(4) The type and date of planting and vegetative cover, the degree of success of growth, and results of tests on the soil of the reclaimed area for such vegetation-sustaining factors as the chief shall prescribe by rule.

The chief shall make an inspection and evaluation of the reclamation of the area within the prescribed period after receipt of the request, or, if the operator fails to complete the reclamation or file the request as required, as soon as the chief learns of such default. If the chief finds that the reclamation meets the requirements of Chapter 1513. of the Revised Code, rules adopted thereunder, in accordance with Chapter 119. of the Revised Code, any orders issued during the mining and reclamation, and the specifications of the plan for mining and reclaiming, and decides to release any remaining bond, cash, or certificates of deposit on deposit to assure reclamation of the area upon which reclamation is completed, he shall, within ten days of completing his inspection and evaluation, publish notice of his decision in a newspaper of general circulation in the county in which the operation is located. The notice shall be published on two days one week apart, and shall describe the size and location of the area for which bond, cash, or

certificates of deposit are to be released and the amount of said bond, cash, or certificates of deposit. Any person claiming to be deprived of a right or protection afforded him by law may file an appeal with the reclamation board of review within ten days after the second publication of notice, objecting to the decision to release such bond, cash, or certificates of deposit. If such an appeal is filed, the requirements of section 1513.13 of the Revised Code shall be followed to the extent that they are not inconsistent with the requirements of this section. The person filing the appeal shall, within three days after the appeal is filed with the board, notify the chief and the operator, by certified mail of the filing of such appeal. If the board affirms the decision of the chief, the costs of the appeal shall be taxed against the appellant, and the chief shall release the remaining bond, cash, or certificates of deposit. If the board finds that the decision of the chief was unreasonable or unlawful, it shall make a written order vacating the decision appealed from and ordering the chief to take all necessary further actions in requiring compliance with section 1513.16 of the Revised Code. After the operator has completed all actions so required by the chief, he shall file another request for inspection and proceed under this division as in the first instance. If no such appeal is filed, the chief shall, upon expiration of the ten days following the second publication of notice, order release of the remaining bond, cash, or certificates of deposit in the same manner as in the case of approval of reclamation other than planting, and the treasurer shall proceed as in such case.

If the chief does not approve the reclamation performed by the operator, he shall notify the operator by certified mail within the prescribed period after the request for inspection is filed or after he learns of the default. The notice shall be an order stating the reasons for unacceptability, ordering further actions to be taken, and setting a time limit for compliance. If the chief does not notify the operator within the prescribed period after a request for inspection is filed that he has not approved the reclamation, it shall be conclusively presumed that the chief has approved the reclamation. If the operator does not comply with the order within the time limit specified, the chief may order an extension of time for compliance, if he

determines that the operator's noncompliance is for good cause, resulting from developments partially or wholly beyond the operator's control. If the operator complies within the time limit or the extension of time granted for compliance, the chief shall order release of the remaining bond, cash, or certificates of deposit in the same manner as in the case of approval of reclamation by the chief, and the treasurer shall proceed as in such case. If the operator does not comply within the time limit and the chief does not order an extension, or if the chief orders an extension of time and the operator does not comply within the extension of time granted for compliance, the chief shall make another order declaring that the operator has failed to reclaim and, if the operator's permit has not already expired or been revoked, revoking the operator's permit. The chief shall then proceed under division (F) of this section.

(F) Upon issuing an order under division (D) or (E) of this section declaring that the operator has failed to reclaim, the chief shall make a finding as to the number and location of the acres of land which such operator has failed to reclaim in the manner required by Chapter 1513. of the Revised Code, and form reclamation on such acres as determined by the chief at the time of application. The chief shall order the release of that proportion of the bond, cash, or certificates of deposit which are on deposit to assure reclamation of those acres which he finds to have been reclaimed in the manner require by Chapter 1513. of the Revised Code. Such release shall be ordered in the same manner as in the case of other approval of reclamation by the chief, and the treasurer shall proceed as in such case. If the operator has on deposit cash or certificates of deposit to assure reclamation of the area of the land affected, the chief shall at the same time issue an order declaring that the remaining proportion of the cash or certificates of deposit is the property of the state and is available for use by the chief in performing reclamation of the area, and shall proceed as under section 1513.18 of the Revised Code.

If the operator has on deposit a surety bond to assure reclamation of the area of land affected, the chief shall notify the surety in writing of the operator's default and shall request the surety to perform the surety's obligation and that of the operator. The surety shall, within ten days after receipt of such

notice, notify the chief as to whether it intends to perform such obligations.

If the surety chooses to perform, it shall arrange for work to begin within thirty days of the day on which it notifies the chief of its decision. If the surety completes the work as required by Chapter 1513. of the Revised Code, the chief shall issue an order to the surety releasing the surety from liability under the bond in the same manner as if the surety were an operator proceeding under this section, If, after the surety begins the work, the chief determines that the surety is not carrying the work forward with reasonable progress, or that it is improperly performing the work, or that it has abandoned the work or otherwise failed to perform its obligation and that of the operator, the chief shall issue an order terminating the right of the surety to perform the work and demanding payment of the amount due as required by Chapter 1513. of the Revised Code.

If the surety chooses not to perform and so notifies the chief, does not respond to the chief's notice within ten days of receipt thereof, or fails to begin work within thirty days of the day it timely notifies the chief of its decision to perform its obligation and that of the operator, the chief shall issue an order terminating the right of the surety to perform the work and demanding payment of the amount due, as required by Chapter 1513. of the Revised Code.

Upon receipt of an order of the chief demanding payment of the amount due, the surety shall immediately deposit with the chief cash in the full amount due under the order, for deposit with the treasurer of state. If the surety fails to make such immediate deposit, the chief shall advise the auditor of state of the amount so that he may certify it to the attorney general for collection. When the chief has issued an order terminating the right of the surety, and has the cash on deposit, such cash is the property of the state and is available for use by the chief, who shall proceed as under section 1513.18 of the Revised Code.

OHIO REVISED CODE

HISTORY: 138 v H 1 (Eff 5-16-79); 138 v H 204. Eff 7-30-79.

§ 1513.18 Reclamation by division.

All cash which becomes the property of the state pursuant to Section 1513.16 of the Revised Code shall be deposited in the state treasury to the credit of the "strip mining reclamation special account," hereby created in the state special revenue fund. Disbursements from such account shall be made by the chief of the division of reclamation only for the purpose of reclaiming areas of land affected by strip mining on which an operator has defaulted.

Expenditures of moneys from the strip mining reclamation special account, except as otherwise provided by this section, shall be made pursuant to contracts entered into by the chief, with the approval of the director of natural resources, with persons who agree to furnish any of the materials, equipment, or labor, as specified and provided in such contracts for the prices stipulated therein, or, with the approval of the director of natural resources and so long as the expenditure does not exceed the cost of reclamation estimated by the chief at the time of application, the chief may reclaim the land in the same manner as set forth in sections 1513.21 to 1513.24 of the Revised Code. Each contract awarded by the chief shall be awarded to the lowest responsible bidder after sealed bids are received, opened, and published at the time and place fixed by the chief. The chief shall publish notice of the time and place at which bids will be received, opened, and published, at least ten days before the date of the opening of the bids, in a newspaper of general circulation in the county in which the area of land to be reclaimed under the contract is located. If, after so advertising for bids, no bids are received by the chief at the time and place fixed for receiving them, the chief may advertise again for bids, or he may, if he considers the public interest will be best served, enter into a contract for the reclamation of the area of land without further advertisement for bids. The chief may reject any or all bids received, and again publish notice of the time and place at which bids for contracts will be received, opened, and published.

Each contract entered into by the chief shall provide only for the reclamation of land affected by the strip mining operation or operations of one operator and not reclaimed by the operator as required by Chapter 1513. of the Revised Code. If there is money in the strip mining reclamation special account derived from the surety bond, cash, or certificates of deposit deposited with the chief by one operator to ensure the reclamation of two or more areas of land affected by the strip mining operation or operations of one operator and not reclaimed by him as required by Chapter 1513. of the Revised Code, the chief may advertise for bids for and award a single contract for the reclamation of all such areas of land. The cost of the reclamation of all such areas of land. The cost of the reclamation work done on each area of land under this section, shall be paid out of the money in the strip mining reclamation special account derived from the surety bond, cash, or certificates of deposit which were deposited with the chief to ensure the reclamation of that area of land, and in no event shall the cost of such work exceed the amount of such money. In the event the amount of money is not sufficient to pay the cost of doing all of the reclamation work on the area of land which the operator should have done but failed to do, the attorney general shall bring an action, at the request of the chief, for the amount of money needed to complete reclamation to the standards required by Chapter 1513. of the Revised Code. The operator is liable for such expense in addition to any other liabilities imposed by law. Moneys so recovered shall be deposited in the strip mining reclamation special account.

If because of default on one permit, the amount deposited in the strip mining reclamation special account is five thousand dollars or more, the chief shall invite bids for reclamation not later than four months after the money derived from the bond, cash, or certificates of deposit has been deposited in such account. If because of default on one permit, the amount deposited in the strip mining reclamation special account is less than five thousand dollars, the chief shall have the reclamation performed by persons in the department of natural resources or shall award a contract for the reclamation without inviting bids. Such award shall be made not later than

four months after the money has been deposited in such account. The reclamation shall commence not later than eight months after any contract for the work is awarded, or if being performed by persons in the department of natural resources, not later than six months after the money has been deposited in such account. The time for beginning reclamation under this section may be extended for not more than six months, if the chief determines that seasonal or weather conditions make commencement of reclamation impracticable.

If any part of the money in the strip mining reclamation special account remains in the account after the chief has caused the area of land to be reclaimed and has paid all the reclamation costs and expenses, the chief shall certify the amount of money which so remains in the special account to the auditor of state, who shall thereupon transfer such amount of money to the strip mining administration and reclamation reserve special account created by section 1513.181 [1513.18.1] of the Revised Code.

OHIO REVISED CODE
Effective: April 9, 1981

Chapter 1513: Reclamation

1513.18 State special revenue fund.

All cash that becomes the property of the state pursuant to section 1513.16 of the Revised Code shall be deposited in the state treasury to the credit of the "coal mining reclamation special account," hereby created in the state special revenue fund. Disbursements from such account shall be made by the chief of the division of reclamation only for the purpose of reclaiming areas of land affected by coal mining on which an operator has defaulted.

Expenditures of moneys from the coal mining reclamation special account shall be made pursuant to contracts entered into by the chief, with the approval of the director of natural resources, in accordance with procedures established by the chief, by rules adopted in accordance with section 1513.02 of the Revised Code. The chief may reclaim the land in the manner as set forth in sections 1513.21 to 1513.24 of the Revised Code. Each contract awarded by the chief shall be awarded to the lowest responsible bidder after sealed bids are received, opened, and published at the time and place fixed by the chief. The chief shall publish notice of the time and place at which bids will be received, opened, and published, at least once at least ten days before the date of the opening of the bids, in a newspaper of general circulation in the county in which the area of land to be reclaimed under the contract is located. If, after so advertising for bids, no bids are received by the chief at the time and place fixed for receiving them, the chief may advertise again for bids, or he may, if he considers the public interest will be best served, enter into a contract for the reclamation of the area of land without further advertisement for bids. The chief may reject any or all bids received, and again publish notice of the time and place at which bids for contracts will be received, opened, and published. The chief may, with the approval of the director of natural resources, enter into a contract with the landowner or with a licensed coal mine operator to carry out reclamation on

a bond forfeiture area without advertising for bids. If the amount of money credited to the coal mining reclamation special account from the forfeiture of the bond applicable to the area of land is not sufficient to pay the cost of doing all of the reclamation work on the area of land that the operator should have done but failed to do, the chief may expend from the reclamation special account created in section 1513.08 of the Revised Code the amount of money necessary to complete the reclamation work to the standards required by this chapter. The chief shall keep a detailed accounting of the expenditures from the reclamation special account to complete reclamation of the land and, upon completion of the reclamation, shall certify the expenditures to the attorney general. Upon the chief's certification of the expenditures from the reclamation special account, the attorney general shall bring an action for the amount of money spent from the reclamation special account to complete reclamation to the standards required by Chapter 1513. of the Revised Code. The operator is liable for such expense in addition to any other liabilities imposed by law. Moneys so recovered shall be deposited in the reclamation special account. The chief may postpone the reclamation, depositing the forfeited bond moneys in a depository trust, until the attorney general has completed efforts to recover the additional moneys.

If any part of the money in the coal mining reclamation special account remains in the account after the chief has caused the area of land to be reclaimed and has paid all the reclamation costs and expenses, the chief may certify the amount of money that so remains in the special account to the auditor of state, who shall thereupon transfer such amount of money to the coal mining administration and reclamation reserve special account created by section 1513.181 of the Revised Code, or the chief may expend such moneys to complete other reclamation work performed under this section.

The chief shall require every contractor performing reclamation work pursuant to this section and section 1513.37 of the Revised Code to pay its workers at the greater of their regular rate of pay as established by contract, agreement, or prior custom or practice, or the average wage rate paid in this

state for the same or similar work performed in the same or similar work performed in the same or similar locality by private companies doing their own reclamation work.

CERTIFICATE OF SERVICE

I certify that three copies of this petition for writ of certiorari were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first-class, postage prepaid this _____ day of April, 1986 to R.P. Cunningham and Raymond A. Pikna, Jr., 180 East Broad Street, Columbus, Ohio, 43215.

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Supreme Court, U.S.
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CLERK

Case No. 85-1811

In the Supreme Court of the United States

October Term, 1985

IN RE: JENNY LYNN MINING COMPANY,
Debtor;

STATE OF OHIO,
DEPARTMENT OF NATURAL RESOURCES,
Petitioner,

v.

GERALD H. SPIERS, TRUSTEE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW

Whether a claim arising from costs of reclamation in excess of the surety bond posted pursuant to Ohio Revised Code §1513.08[1] is a general unsecured claim entitled to priority status pursuant to 11 U.S.C. §507(a)(6)(E)[2] as an excise tax?

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[1]Ohio law provides that a surety is held to the obligation which attaches to his bond by virtue of the law in force at the time the surety enters into its undertaking. *McGaughey v. Jacoby*, 54 Ohio St. 487, 500, 44 N.E. 231, 234 (1896). Citations will therefore be provided to Ohio statutes in force prior to February 18, 1981, the date of filing of the Chapter 7 petition herein. Although amendments to the cited statutes do not alter the respondent Trustee's arguments, copies are set forth in the appendix of the cited statutes as amended effective after February 18, 1981 but prior to August 7, 1981, the date of filing of Amended Proof of Claim No 15.

[2]The Bankruptcy Amendments and Federal Judgeship Act of 1984 (Pub. L. No. 98-353) amended 11 U.S.C. §507. As a result, the subsection relating to the priority of taxes has been renumbered as 11 U.S.C. §507(a)(7) from 11 U.S.C. §507(a)(6). Although the substance of the text of 11 U.S.C. §507(a)(7)(E) is unchanged from 11 U.S.C. §507(a)(6)(E), reference will be made to the statute as numbered prior to the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	ii
REASONS FOR DENYING THE PETITION	1
CONCLUSION	8
APPENDIX	1a
CERTIFICATE OF SERVICE	23a

TABLE OF AUTHORITIES

CASES

In re Jenny Lynn Mining Co., 780 F.2d 585 (6th Cir. 1986) 1, 2, 4, 5, 7

In re Kovacs, 29 Bankr. 816 (Bankr. S.D. Ohio 1982) 3

In re Kovacs, 717 F.2d 984 (6th Cir. 1983), *aff'd Ohio v. Kovacs*, 469 U.S. __, 105 S.G. 705 (1985) 3

In re Lorber Industries of California, Inc., 675 F.2d 1062 (9th Cir. 1982) 2, 4, 5, 6

In re Pan American Paper Mills, Inc., 618 F.2d 159 (1st Cir. 1980) 4, 5

In re Payne, 27 Bankr. 809 (Bankr. Kan. 1983) 5

In re William Akers, Jr., Co., 121 F.2d 846 (3rd Cir. 1941) 4

McGaughey v. Jacoby, 54 Ohio St. 487, 44 N.E. 231, 234 (1986) i

National Cable Television Assn., Inc. v. United States, 415 U.S. 336 (1974) 1, 2, 4

New York v. Feiring, 313 U.S. 283 (1941) 1, 2, 4

Ohio v. Kovacs, 469 U.S. __, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985) 2, 3, 5, 6

United States v. River Coal Co., 748 F.2d 1103 (6th Cir. 1984) 1, 2, 4

STATUTES

FEDERAL

Page

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 11 U.S.C. §§101-151326 5

11 U.S.C. §507 (1979) ..... i, 5, 6, 1a

11 U.S.C. §507 (a)(6) (1979) ..... i, 3, 5, 2a

11 U.S.C. §507 (a)(6)(E) (1979) ..... i, 1, 3, 6, 3a

[Renumbered 11 U.S.C. §507(a)(7)(E) (Supp. II 1985)]

11 U.S.C. §523(a)(1)(A)(1979) 3, 5, 9a

11 U.S.C. §523 (a)(6)(1979) 3, 5a

11 U.S.C. §523(a)(7)(1979) ..... i, 2, 3, 5a

11 U.S.C. §727 (1979) (Supp. 1984) 5, 6a

30 U.S.C. §1232 (1979) 2, 10a

STATE

Ohio Revised Code §1513.08 (Page 1978) ..... i, 1, 2, 13a

Ohio Revised Code §1513.08 1980 Ohio Legis. Serv. 5-738 (Baldwin) 16a

Ohio Revised Code §5749.02 (Page 1980) 2, 18a

Ohio Revised Code Ann. §5749.02 1980 Ohio Legis. Serv. 5-755 (Baldwin) 20a

MISCELLANEOUS

H.R. Rep. No. 95-595, 95th Cong. 2nd Sess. (1978), 5 U.S. Code Cong. & Ad. News 5856 6

S. Rep. No. 95-989, 95th Cong. 2nd Sess. (1978), 5 U.S. Code Cong. & Ad. News 5856 6

REASONS FOR DENYING THE PETITION

The issue before this Court is whether a claim arising from costs of reclamation in excess of the surety bond posted pursuant to Ohio Revised Code §1513.08 is a general unsecured claim entitled to priority status pursuant to 11 U.S.C. §507(a)(6)(E) as an excise tax. In resolving that issue, the Sixth Circuit Court of Appeals properly applied the decisions of this Court and held that the claim of the Ohio Department of Natural Resources[3] for the non-payment of the surety bond is a general unsecured claim. *In re Jenny Lynn Mining Co.*, 780 F.2d 585, 589 (6th Cir. 1986).

A. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IS CONSISTENT WITH PRECEDENT.

The decision of the Sixth Circuit Court of Appeals, *In re Jenny Lynn Mining Co.*, 780 F.2d 585 (6th Cir. 1986), is consistent with prior decisions of this Court. The Sixth Circuit Court of Appeals followed *New York v. Feiring*, 313 U.S. 283 (1941), but found that the definition of taxes in that case was of limited utility because *Feiring* did not require the Court to make the distinction between governmentally imposed fees and taxes. 780 F.2d at 589. The Sixth Circuit Court of Appeals had previously made that distinction in *United States v. River Coal Co.*, 748 F.2d 1103 (6th Cir. 1984), and therefore turned to it.

In *River Coal*, a case decided under the Bankruptcy Act of 1898, as amended, the Court held that the interest on delinquent abandoned mine reclamation fees was a tax. 748 F.2d at 1106. The Court relied in part on *National Cable Television Assn., Inc. v. United States*, 415 U.S. 336 (1974), a decision of this Court which identified some of the differing characteristics of taxes and fees. 748 F.2d at 1106.

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[3]Hereinafter referred to as ODNR.

The distinction between governmentally imposed fees and taxes is a valid one[4]. In *River Coal*, the Court considered the reclamation fee collected pursuant to 30 U.S.C. §1232. 748 F.2d at 1105. That statutory provision of federal law is equivalent to the mineral severance tax collected pursuant to Ohio Revised Code §5749.02. That state mineral severance tax is specifically called an excise tax. One of its purposes is to provide revenue to reclaim land affected by mining. Ohio Revised Code Ann. §5749.02 (Page 1980). In the event that tax is not paid, it becomes a lien on property of the taxpayer in the state of Ohio. *Id.* This is in contrast to the use mandated by Ohio Revised Code §1513.08 of the cash, surety bond or certificates of deposit to reclaim strip mined lands of a specific operator in the event of that operator's default.

As recently noted by Justice O'Connor, "a State may protect its interests in the enforcement of its environmental laws by giving cleanup judgments the status of statutory liens or secured claims." *Ohio v. Kovacs*, 469 U.S. at ____, 105 S.Ct. 705, 712 (1985) (O'Connor, J., concurring). In *Kovacs*, this Court held that the obligation of an individual debtor to pay money to clean up toxic materials from a site was a dischargeable debt. 469 U.S. at ____, 105 S.Ct. at 711.

This Court noted in *Kovacs* that the only issue before it was the affirmative duty of the debtor to clean up the site and to pay money to that end. 469 U.S. at _____, 105 S.Ct. at 711. The Court also noted that if a fine or monetary penalty for violating state law had been imposed on the debtor prior to the filing of the petition, the obligation might be mondischargeable pursuant to 11 U.S.C. §523(a)(7). *Id.*

[4]The Ninth Circuit Court of Appeals, in holding that sewer user fees did not constitute taxes, followed *New York v. Fiering*, 313 U.S. 283 (1941), and also adopted the distinction drawn between taxes and governmentally imposed fees in *National Cable Television Assn., Inc. v. United States*, 415 U.S. 336 (1974). *In re Lorber Industries of California, Inc.*, 675 F.2d 1062, 1066-68 (9th Cir. 1982).

However, as noted by Bankruptcy Judge Perlman, discharge of the obligation of the debtor to pay the State of Ohio compensation for pecuniary loss occasioned by the necessity to clean up the site would not be barred by 11 U.S.C. §523(a)(7). *In re Kovacs*, 29 Bankr. 816, 818 (Bankr. S.D. Ohio 1982). That bankruptcy court decision was affirmed by the district court. Subsequently, the Sixth Circuit Court of Appeals noted that if the State of Ohio has assessed a money penalty against the debtor for the environmental damage caused, the penalty might have been excepted from discharge pursuant to 11 U.S.C. §523(a)(6) or (7). *In re Kovacs*, 717 F.2d 984, 988 (6th Cir. 1983), *aff'd Ohio v. Kovacs*, 469 U.S. _____, 105 S.Ct. 705 (1985). There was no suggestion that the claim of the State of Ohio was excepted from discharge as a tax within the scope of 11 U.S.C. §523(a)(1)(A).

The interplay of 11 U.S.C. §507(a)(6) and 11 U.S.C. §523(a)(1)(A) definitively demonstrates that the surety bond in issue is not a tax. Pursuant to 11 U.S.C. §523(a)(1)(A), an individual debtor may not be discharged from a tax of a kind specified in 11 U.S.C. §507(a)(6). Therefore, if a debt of an individual debtor does not fall within the exception to discharge set forth in 11 U.S.C. §523(a)(1)(A), that debt is dischargeable and could therefore not be an excise tax pursuant to 11 U.S.C. §507(a)(6)(E). In *Kovacs*, this Court held that the obligation of an individual debtor to pay money to clean up toxic materials from a site was a dischargeable debt. 469 U.S. at _____, 105 S.Ct. at 711. The surety bond in issue is an obligation conceptually identical to the obligation to clean up toxic materials considered by this Court in *Kovacs*. Since this surety bond obligation would be dischargeable as to an individual debtor, it is not an excise tax.

The decision of the Sixth Circuit Court of Appeals from which ODNR seeks a Petition for Writ of Certiorari is consistent with precedent. The Petition for Writ of Certiorari should therefore be denied.

B. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH THE INTERPRETATION OF OTHER CIRCUITS WITH RESPECT TO THE WORD "TAX" FOR BANKRUPTCY PURPOSES.

The decision of the Sixth Circuit Court of Appeals, *In re Jenny Lynn Mining Co.*, 780 F.2d 585 (6th Cir. 1986), does not conflict with the interpretation by other Circuit Courts of Appeal of the word "tax" for bankruptcy purposes. The Sixth Circuit Court of Appeals followed *New York v. Feiring*, 313 U.S. 283, 285 (1941), with regard to the definition of "taxes" for bankruptcy purposes. 780 F.2d at 589. Contrary to ODNR's assertions, *Jenny Lynn* is consistent with *In re Pan American Paper Mills, Inc.*, 618 F.2d 159 (1st Cir. 1980), in which the First Circuit Court of Appeals also followed *Feiring*.[5] *Jenny Lynn* is also consistent with *In re Lorber Industries of California, Inc.*, 675 F.2d 1062 (9th Cir. 1982), a decision of the Ninth Circuit Court of Appeals which adopted *New York v. Feiring, supra*, as well as *National Cable Television Assn., Inc. v. United States*, 415 U.S. 336 (1974), and recognized the distinction between taxes and governmentally imposed fees. That Court held that sewer user fees did not constitute taxes entitled to priority treatment. 675 F.2d at 1066-68.

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[5]The First Circuit Court of Appeals, citing *In re William Akers, Jr., Co.*, 121 F.2d 846 (3d Cir, 1941), compared the premiums assessed under Puerto Rico's Workmen's Accident Compensation Act to a state's claim for unemployment contributions. *In re Pan American Mills, Inc.*, 618 F.2d at 162. The Third Circuit Court of Appeals in *Akers* did not cite *New York v. Feiring*, 313 U.S. 283 (1941), which was decided less than two months prior to the *Akers* case.

In *Jenny Lynn*, 780 F.2d at 588-89, the Sixth Circuit Court of Appeals followed its prior decision, *United States v. River Coal Co.*, 748 F.2d 1003 (6th Cir. 1984), which considered the *Pan American Mills* decision in its reasoning. 748 F.2d at 1106.

The decision of the Sixth Circuit Court of Appeals, *In re Jenny Lynn Mining Co.*, 780 F.2d 585 (6th Cir. 1986), is consistent with prior decisions of this Court and the decisions of other Circuit Courts, and ODNR's Petition for Writ of Certiorari should therefore be denied.

C. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS CONFORMS TO THE POLICY OF FEDERAL BANKRUPTCY LAW.

The decision of the Sixth Circuit Court of Appeals, *In re Jenny Lynn Mining Co.*, 780 F.2d 585 (6th Cir. 1986), conforms to the policy of federal bankruptcy law. The broad purpose of the Bankruptcy Code[6] is to equitably distribute the debtor's estate, and the priority provisions of 11 U.S.C. §507 run counter to that broad purpose because they create a special status for specified claims. *See In re Lorber Industries of California, Inc.*, 675 F.2d 1062, 1065-66 (9th Cir. 1982). Priority status must be justified by a clear statutory authorization. 675 F.2d at 1066. In addition, the trend is to give a "somewhat less expansive interpretation of what are 'taxes' under the priority statutes in bankruptcy," *In re Payne*, 27 Bankr. 809, 817 (Bankr. Kan. 1983). Exceptions to discharge should be liberally construed in favor of the debtor,[7] and ambiguities in the Bankruptcy Code must be resolved in favor of the debtor. 27 Bankr. at 817.

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[6]Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 11 U.S.C. §§101-151326.

[7]Only those taxes which are entitled to priority pursuant to 11 U.S.C. §507(a)(6) would be excepted from discharge pursuant to 11 U.S.C. §523(a)(1)(A). A cleanup order reduced to a monetary obligation is dischargeable under 11 U.S.C. §727 *Ohio v. Kovacs*, 469 U.S. ___, 105 S.Ct. 705, 711 (1985). If an individual debtor were involved, the surety bond in issue would also be dischargeable and the surety bond could therefore not be deemed a priority tax.

The State of Ohio is not precluded from protecting its interest in the enforcement of its environmental law. Justice O'Connor has suggested that states could protect their interests in the enforcement of their environmental laws by giving cleanup judgments the status of statutory liens or secured claims. *Ohio v. Kovacs*, 469 U.S. ____, 105 S.Ct. 705, 712 (1985) (O'Connor, J., concurring).[8]

There is a close relationship between the environmental cleanup obligation presented in *Kovacs* and the obligation to reclaim land presented herein. The public policy considerations are very similar. If anything, the public policy considerations in *Kovacs* are even more compelling than those presented herein because the threat of toxic wastes to the public health, safety and welfare in *Kovacs* is much greater than the alleged threat herein of an open pit. If pre-petition claims for environmental damage are to receive special treatment, Gerald H. Spiers submits that the legislature should codify that special treatment. At the present time, pre-petition claims for environmental damage do not fall within the limited priority classification of 11 U.S.C. §507(a)(6)(E)[9] for excise taxes nor within the other classes of priority claims enumerated in 11 U.S.C. §507.

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[8]*In re Lorber Industries of California, Inc.*, 675 F.2d 1062 (9th Cir. 1982), supports Justice O'Connor's suggestion. The state statutes under which the county sanitation district operated in *Lorber Industries* provided that unpaid sewer user fees would constitute a lien against the user's real property. 675 F.2d at 1068. If the district had perfected its lien, it would have been treated as a secured creditor. *Id.*

[9]Although ODNR asserts that "a claim classified as a tax is accorded priority treatment in the distribution of assets in the bankruptcy proceedings, 11 U.S.C. 507(a)(6)(E)," Petition for Writ of Certiorari at 6-7, neither the legislative history of 11 U.S.C. §507 nor case law support that sweeping conclusion. "The sixth priority is for *certain* taxes." [Emphasis added.] H.R. Rep. No. 95-595, 95th Cong. 2nd Sess. (1978), 5 U.S. Code Cong. & Ad. News 5856, S. Rep. No. 95-989, 95th Cong., 2nd Sess. (1978), 5 U.S. Code Cong. & Ad. News 5856. *See In re Lorber Industries of California, Inc., 675 F.2d 1062, 1065-66 (9th Cir. 1982), discussed in Argument C, supra* at 5.

The bankruptcy estate of Jenny Lynn Mining Company should not be forced to bear the burden of the State of Ohio's failure to enact legislation to protect the interest it seeks to assert in the enforcement of its environmental laws. If the position asserted by ODNR were sustained, all fees would be "taxes" for bankruptcy purposes. *See In re Jenny Lynn Mining Co.*, 780 F.2d 585, 589 (6th Cir. 1986). That position was specifically rejected by the Sixth Circuit Court of Appeals. *Id.* In addition, it is not appropriate that an obligation for a surety bond, which is no different from any obligation due upon default by Jenny Lynn Mining Co., should be accorded priority treatment merely because it is owed to the State of Ohio. Priority treatment in favor of the State would result in inequitable treatment of other creditors of Jenny Lynn Mining Co. as they would effectively become liable for the costs of reclamation merely by having extended credit to a debtor which unknown to them had failed to reclaim strip mined land and subsequently filed for relief under the Bankruptcy Code. The decision of the Sixth Circuit Court of Appeals conforms to the policy underlying federal bankruptcy law. This Court should therefore deny the Petition for Writ of Certiorari.

CONCLUSION

The case at bar was properly decided by the Sixth Circuit Court of Appeals. It is consistent with decisions of this Court and with decisions of other Circuit Courts of Appeal. Creation of a priority classification for a surety bond relating to reclamation would contravene the established policy to equitably distribute the debtor's estate. The Sixth Circuit Court of Appeals correctly applied the law. If the surety bond relating to reclamation is to be accorded priority status in a bankruptcy case, Congress can enact appropriate legislation.

WHEREFORE, Gerald H. Spiers, Trustee for Jenny Lynn Mining Company, respectfully requests that this Court deny the Petition for Writ of Certiorari requested by the State of Ohio, Department of Natural Resources.

Respectfully submitted,

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BANKRUPTCY REFORM ACT OF 1978
11 U.S.C. §507

§507. Priorities.

(a) The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

(2) Second, unsecured claims allowed under section 502(f) of this title.

(3) Third, allowed unsecured claims for wages, salaries, or commissions, including vacation, severance and sick leave pay—

(A) earned by an individual within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) to the extent of $2,000 for each such individual.

(4) Fourth, allowed unsecured claims for contributions to employee benefit plans—

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of—

(i) the number of employees covered by such plan multiplied by $2,000; less

(ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(5) Fifth, allowed unsecured claims of individuals, to the extent of $900 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

(6) Sixth, allowed unsecured claims of governmental units, to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts—

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(c) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax assessed before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (3) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable

law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on—

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise—

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

(b) If the trustee, under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of

a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(1) of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim under such subsection.

(c) For the purpose of subsection (a) of this section, a claim of a governmental unit arising from an erroneous refund or credit of a tax shall be treated the same as a claim for the tax to which such refund or credit relates.

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(3), (a)(4), (a)(5), or (a)(6) of this section is not subrogated to the right of the holder of such claim to priority under such subsection.

BANKRUPTCY REFORM ACT OF 1978
11 USC 523

§523. Exceptions to discharge.

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(6) of this title, whether or not a claim for such tax was filed or allowed;

* * *

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

* * *

BANKRUPTCY REFORM ACT OF 1978
11 USC 727

§727. Discharge

(a) The court shall grant the debtor a discharge, unless—

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case—

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the property[1] invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371 or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—

Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2609

[1]So in original. Probably should read "property".

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; or

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

(c)(1) The trustee or a creditor may object to discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee or a creditor, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if—

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of, or

entitlement to, such property, or to deliver or surrender such property to the trustee; or

(3) the debtor committed an act specified in subsection (a)(6) of this section.

(e) The trustee or a creditor may request a revocation of a discharge—

(1) under subsection (d)(1) of this section, within one year after such discharge was granted; or

(2) under subsection (d)(2) or (d)(3) of this section, before the later of—

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

Public Law 95-87, Aug. 3, 1977
30 USC §1232

§1232. Reclamation fee

(a) Payment; rate

All operators of coal mining operations subject to the provisions of this chapter shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation fee of 35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal shall be at a rate of 2 per centum of the value of the coal at the mine, or 10 cents per ton, whichever is less.

(b) Due date

Such fee shall be paid no later than thirty days after the end of each calendar quarter beginning with the first calendar quarter occurring after August 3, 1977, and ending fifteen years after August 3, 1977, unless extended by an Act of Congress.

(c) Submission of statement

Together with such reclamation fee, all operators of coal mine operations shall submit a statement of the amount of coal produced during the calendar quarter, the method of coal removal and the type of coal, the accuracy of which shall be sworn to by the operator and notarized.

(d) Penalty

Any person, corporate officer, agent or director, on behalf of a coal mine operator, who knowingly makes any false statement, representation or certification, or knowingly fails to make any statement, representation or certification required in this section shall, upon conviction, be purnished by a fine of

not more than $10,000, or by imprisonment for not more than one year, or both.

(e) Civil action to recover fee

Any portion of the reclamation fee not properly or promptly paid pursuant to this section shall be recoverable, with statutory interest, from coal mine operators, in any court of competent jurisdiction in any action at law to compel payment of debts.

(f) Cooperation from other agencies

All Federal and State agencies shall fully cooperate with the Secretary of the Interior in the enforcement of this section.

(g) Allocation of funds

(1) The geographic allocation of expenditures from the fund shall reflect both the area from which the revenue was derived as well as the national program needs for the funds.

(2) Fifty per centum of the funds collected annually in any State or Indian reservation shall be allocated to that State or Indian reservation by the Secretary pursuant to any approved abandoned mine reclamation program to accomplish the purposes of this subchapter. Where the Governor of a State or the head of a governing body of a tribe certifies that (i) objectives of the fund set forth in sections 1233 and 1239 of this title have been achieved, (ii) there is a need for construction of specific public facilities in communities impacted by coal development, (iii) impact funds which may be available under provisions of the Federal Mineral Leasing Act of 1920, as amended [30 U.S.C.A. §181 et seq.], or the Act of October 20, 1976, Public Law 94-565 (90 Stat. 2662) [31 U.S.C.A. §1601 et seq.], are inadequate for such construction, and (iv) the Secretary concurs in such certification, then the Secretary may continue to allocate all or part of the 50 per centum share to that State or tribe for such construction: *Provided, however,*

That if funds under this subparagraph (2) have not been expended within three years after their allocation, they shall be available for expenditure in any eligible area as determined by the Secretary.

(3) The balance of funds collected on an annual basis may be expended in any State at the discretion of the Secretary in order to meet the purposes of this subchapter. Such funds may be expended directly by the Secretary or by making additional grants to approved State reclamation programs pursuant to section 1235 of this title when the Secretary finds that such programs are the best means of accomplishing the specific reclamation projects. The Secretary shall consult and coordinate with the respective States those projects funded directly or in conjunction with other Federal agencies.

OHIO REVISED CODE
History: 136 v. H191 (Eff. 10-10-75)

§1513.08. Operator's surety bond.

(A) The surety bond referred to in division (A) of section 1513.07 of the Revised Code, relating to original applications, shall be upon such form as the chief of the division of reclamation prescribes and provides, and shall be signed by the operator as principal, and by a surety company authorized to transact business in the state as surety. Such bond shall be payable to the state and shall be conditioned upon the faithful performance by the operator of all things to be done and performed by him as provided in section 1513.16 of the Revised Code, or rules or orders of the chief adopted or issued pursuant to that section. The bond shall be for the payment of an amount of money equal to the estimated cost to the state to perform reclamation required by section 1513.16 of the Revised Code in case of default by the operator. No such surety bond shall be for the payment of an amount of money less than five thousand dollars. The amount of the bond shall be determined by order of the chief. Such order may be appealed, either in whole or in part, by the operator. The operator may deposit with the chief, in lieu of surety bond, cash in an amount equal to the surety bond as prescribed in this division of this section, or negotiable certificates of deposit issued by any bank organized or transacting business in this state or certificates of deposit issued by any building and loan association as defined in section 1151.01 of the Revised Code having a cash value equal to or greater than the amount of the surety bond as prescribed in this division of this section. Cash or certificates of deposit shall be deposited upon the same terms as the terms upon which surety bonds may be deposited. If one or more certificates of deposit are deposited with the chief in lieu of surety bond, he shall require the bank or building and loan association which issued any such certificate to pledge

securities of a cash value equal to the amount of the certificate, or certificates, which is in excess of the amount insured by any of the agencies and instrumentalities created by or under the following acts and amendments thereto:

(1) Federal Deposit Insurance Corporation, 64 Stat. 873, 12 U.S.C. 1811;

(2) Federal Savings and Loan Insurance Corporation, 48 Stat. 1256, 12 U.S.C. 1726;

(3) Deposit guaranty association, sections 1151.80 to 1151.92 of the Revised Code. Such securities shall be security for the repayment of the certificate of deposit.

Immediately upon a deposit of cash or certificates with the chief, he shall deliver it to the treasurer of state who shall hold it in trust for the purposes for which it has been deposited. The treasurer of state shall be responsible for the safekeeping of such deposits. An operator making a deposit of cash or certificates of deposit may withdraw and receive from the treasurer of state, on the written order of the chief, all or any part of the cash or certificates in the possession of the treasurer of state, upon depositing with the treasurer of state cash or negotiable certificates of deposit issued by any bank organized or transacting business in this state or certificates of deposit issued by any building and loan association equal in value to the value of the cash or certificates withdrawn. An operator may demand and receive from the treasurer of state all interest or other income from any certificates as it becomes due. If certificates deposited with and in the possession of the treasurer of state mature or are called for payment by the issuer thereof, the treasurer of state, at the request of the operator who deposited them, shall convert the proceeds of the redemption or payment of the certificates into such other negotiable certificates of deposit issued by any bank organzied or transacting business in this state, or such other certificates

of deposits issued by any building and loan association, or cash, as may be designated by the operator.

(B) The surety bond referred to in division (F) of section 1513.07 of the Revised Code relating to amendments to a permit shall be upon such form as the chief of the division of reclamation prescribes and provides, and shall be signed by the operator as principal and by a surety company authorized to transact business in the state as surety. Such bond shall be payable to the state and shall be conditioned upon the faithful performance by the operator of all things to be done and performed by him as provided in section 1513.16 of the Revised Code or rules or orders of the chief adopted or issued pursuant to that section. The bond shall be for the payment of an amount of money equal to the estimated cost to the state to perform reclamation required by section 1513.16 of the Revised Code, in case of default by the operator. The amount of the bond shall be determined by order of the chief. Such order may be appealed, either in whole or in part, by the operator.

The operator may deposit with the chief in lieu of surety bond, cash in an amount equal to the surety bond as prescribed in this division of this section, or negotiable certificates of deposit issued by any bank organized or transacting business in this state, or certificates of deposit issued by any building and loan association having a cash value equal to or greater than the amount of such surety bond. Cash or certificates deposited shall be deposited upon the same terms as the terms upon which such surety bonds may be deposited. Cash or certificates deposited with the chief shall be delivered by him to the treasurer of state, and the treasurer of state shall hold such cash and certificates and make disposition thereof in accordance with the provisions contained in division (A) of this section pertaining to cash or certificates delivered to the treasurer of state as therein provided.

OHIO REVISED CODE
History: 138 v. H1051, (Eff 4-9-81)

1513.08. Bonds.

Sec. 1513.08. (A) After a coal mining and reclamation permit application has been approved but before the permit is issued, the applicant shall file with the Chief of the Division of Reclamation, on a form prescribed and furnished by the chief, a bond for performance payable, as appropriate, to the state and conditional upon faithful performance of all the requirements of this chapter and the permit. The bond shall cover that area of land within the permit area upon which the operator will initiate and conduct coal mining and reclamation operations within the initial term of the permit. As succeeding increments of coal mining and reclamation operations are to be initiated and conducted within the permit area, the permittee shall file with the chief an additional bond or bonds to cover the increments in accordance with this section. The amount of the bond shall be two thousand five hundred dollars per acre or portion thereof. The minimum amount of bond furnished shall be ten thousand dollars. In the event of forfeiture of a bond, and the bond is insufficient to complete the reclamation the chief shall complete the reclamation in accordance with section 1513.18 of the revised code using funds from the reclamation special account.

There is hereby created the Reclamation Special Account in the State Special Revenue Fund to be used by the Chief of the Division of Reclamation to reclaim permit areas upon which any bond has been forfeited before or after the effective date of this section in accordance with section 1513.18 of the Revised Code. Initially, the Special Account shall consist of moneys transferred to it from the unreclaimed lands special account created in section 1513.30 of the revised code. Thereafter, as funds are spent from the reclamation special account, the auditor of state, upon the certification of the chief, shall

transfer such additional funds from the unreclaimed lands special account to keep the balance of the reclamation special account at two million dollars; however, after the initial funding of the special account, the auditor of state shall not transfer more than five hundred thousand dollars to the reclamation special account during any fiscal year.

(B) Liability under the bond shall be for the duration of the coal mining and reclamation operation and for a period coincident with operator's responsibility for revegetation requirements in section 1513.16 of the revised code. The bond shall be executed by the operator and a corporate surety licensed to do business in this state, except that the operator may elect to deposit cash, negotiable bonds of the United States or this state, or negotiable certificates of deposit of any bank or savings and loans organized or transacting business in the United States. The cash deposit or market value of the securities shall be equal to or greater than the amount of the bond required for the bonded area.

(C) The chief may accept the bond of the applicant itself without separate surety when the applicant demonstrates to the satisfaction of the chief the existence of a suitable agent to receive service of process and a history of financial solvency and continuous operation sufficient for authorization to self-insure or bond the amount.

(D) Cash or securities so deposited shall be deposited upon the same terms as the terms upon which surety bonds may be deposited. The securities shall be security for the repayment of such negotiable certificate of deposit.

(E) The amount of the bond or deposit required and the terms of each acceptance of the applicant's bond shall be adjusted by the chief from time to time as affected land acreages are increased or decreased.

OHIO REVISED CODE
History: 135 v. H204 (Eff. 7-30-79)

§5749.02. Mineral severance tax.

For the purpose of providing revenue with which to meet the environmental management needs of this state and the reclamation of land affected in mining, an excise tax is hereby levied on the privilege of engaging in the severance of natural resources from the soil or water of this state. Such tax shall be imposed upon the severer and shall be:

(A) Four cents per ton of coal;

(B) Four cents per ton of salt;

(C) One cent per ton of limestone or dolomite;

(D) One cent per ton of sand and gravel;

(E) Three cents per barrel of oil;

(F) One cent per thousand cubic feet of natural gas.

Seventy-five per cent of the moneys received by the treasurer of state from the tax levied in this section shall be credited to the unreclaimed lands special account created in section 1513.30 of the Revised Code, and twenty-five per cent shall be credited to the oil and gas well plugging special account created in section 1509.071 [1509.07.1] of the Revised Code.

On the day fixed for the payment of the severance tax required to be paid by this section, such tax, with any penalties or interest thereon, shall become a lien on all property of the taxpayer in this state, whether such property is employed by the taxpayer in the prosecution of its business or is in the hands of an assignee, trustee, or receiver for the benefit of creditors or stockholders. Such lien shall continue until such taxes, together with any penalties or interest thereon, are paid.

Upon failure of such taxpayer to pay such tax on the day fixed for payment, the tax commissioner may file, for which no

filing fee shall be charged, in the office of the county recorder in each county in this state in which the taxpayer owns or has a beneficial interest in real estate, notice of such lien containing a brief description of such real estate. Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor whose rights have attached prior to the time such notice is filed in the county in which the real estate which is the subject of such mortgage, purchase, or judgment lien is located. Such notice shall be recorded in a book kept by the recorder called the "severance tax lien record" and indexed under the name of the taxpayer charged with such tax. When the tax, together with any penalties or interest thereon, has been paid, the tax commissioner shall furnish to the taxpayer an acknowledgement of such payment, which the taxpayer may record with the recorder of each county in which notice of the lien has been filed.

OHIO REVISED CODE
History: 138 v. H1051 (Eff. 4-9-81)

5749.02. Mineral severance tax

Sec. 5749.02. (A) For the purpose of providing revenue with which to meet the environmental management needs of this state and the reclamation of land affected by mining, an excise tax is hereby levied on the privilege of engaging in the severance of natural resources from the soil or water of this state. Such tax shall be imposed upon the severer and shall be:

(1) Four cents per ton of coal:

(2) Four cents per ton of salt:

(3) One cent per ton of limestone or dolomite;

(4) One cent per ton of sand and gravel;

(5) Three cents per barrel of oil;

(6) One cent per thousand cubic feet of natural gas.

Seventy-five per cent of the moneys received by the treasurer of state from the tax levied in this division shall be credited to the unreclaimed lands special account created in section 1513.30 of the Revised Code, and twenty-five per cent shall be credited to the oil and gas well plugging special account created in section 1509.071 of the Revised Code.

(B) For the purpose of paying the state's expenses for reclaiming coal mined lands that the operator failed to reclaim in accordance with chapter 1513 of the revised code on or after the effective date of this division for which the operator's bond is not sufficient to pay the state's expense for reclamation, there is hereby levied an excise tax on the privilege of engaging in the severance of coal from the soil or water of this state in addition to the tax levied by division (A)(1) of this section. The tax shall be imposed at the rate of one cent per ton of coal as prescribed in this division. Moneys received by the treasurer of state from the tax levied under this division shall be credited

to the reclamation special account created in section 1513.08 of the revised code.

After initial funding of the Reclamation Special Account, as provided in section 1513.08 of the revised code, the tax levied by this section shall be imposed when, during any fiscal year, the balance of the reclamation special account is reduced below two million dollars and five hundred thousand dollars have been transferred to the reclamation special account from the unreclaimed lands special account created in section 1513.30 of the revised code during the fiscal year. The tax shall be imposed in the calendar year following the close of the fiscal year during which the balance is so reduced and shall continue to be imposed until the end of the calendar year in which the balance of the reclamation special account is restored to two million dollars, at which time the imposition of the tax shall be suspended until the time that the circumstances requiring the tax to be imposed recur.

When at the close of the fiscal year, the chief of the division of reclamation finds that the balance of the reclamation special account is below two million dollars and that five hundred thousand dollars have been transferred to the special account previously in the fiscal year, the chief shall, within thirty days after the close of the fiscal year, certify that fact to the tax commissioner, at which time the circumstances requiring the imposition of the tax shall be deemed to have occurred.

(C) On the day fixed for the payament of the severance taxes required to be paid by this section, the taxes with any penalties or interest thereon; shall become a lien on all property of the taxpayer in this state; whether such property is employed by the taxpayer in the prosecution of its business or is in the hands of an assignee, trustee, or receiver for the benefit of creditors or stockholders. The lien shall continue until the taxes and any penalties or interest thereon, are paid.

Upon failure of the taxpayer to pay a tax on the day fixed for payment, the tax commissioner may file, for which no filing fee shall be charged, in the office of the county recorder in each county in this state in which the taxpayer owns or has a beneficial interest in real estate, notice of the lien containing a brief description of the real estate. the lien shall not be valid as against any mortgagee, purchaser, or judgment creditor whose rights have attached prior to the time the notice is filed in the county in which the real estate that is the subject of such mortgage, purchase, or judgment lien is located. The notice shall be recorded in a book kept by the recorder called the "severance tax lien record" and indexed under the name of the taxpayer charged with the tax. When the tax has been paid, the tax commissioner shall furnish to the taxpayer an acknowledgement of payment, which the taxpayer may record with the recorder of each county in which notice of the lien has been filed.

CERTIFICATE OF SERVICE

I certify that three copies of this Brief in Opposition to Petition for Writ of Certiorari were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first class, postage prepaid this __ day of May, 1986 to E. Dennis Muchnicki, State Office Tower, 30 East Broad Street, 17th Floor, Columbus, Ohio 43266-0410.

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